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No. 2393

IN

The United States Circuit Court of Appeals

Ninth Circuit

THE STEAMER SAMSON, and BARGE No. 8,
BARGE No. 9 and BARGE No. 27

COLUMBIA CONTRACT COMPANY,
a Corporation
CLAIMANT AND APPELLANT

SHAVER TRANSPORTATION COMPANY,
a Corporation
LIBELLANT AND APPELLEE

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation
RESPONDENT IN PERSONA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

Brief on Behalf of Claimant
and Appellant

TEAL, MINOR & WINFREE
ROGERS MAC VEAGH
Practors for Appellant

WOOD, MONTAGUE & HUNT
Practors for Appellee

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No. _____

**In the United States Circuit
Court of Appeals
for the Ninth Circuit**

THE STEAMER "SAMSON," and Barge No. 8,
Barge No. 9 and Barge No. 27,
COLUMBIA CONTRACT COMPANY,
a Corporation,
Claimant and Appellant,
SHAVER TRANSPORTATION COMPANY,
a Corporation,
Libellant and Appellee,
STANDARD OIL COMPANY OF
CALIFORNIA,
a Corporation,
Respondent in Personam.

*Appeal from the District Court of the United States
for the District of Oregon*

**Brief on Behalf of the Claimant
and Appellant**

This controversy arose from a collision between the "Samson" and her tow and the "Henderson" and her tow which occurred in the waters of the Columbia River

at 1:40 A. M. on the 22nd of July, 1911. The "Henderson" was sunk and libel proceeds upon the theory that the "Henderson" was a total loss. The oil barge in tow of the "Henderson" was not damaged; the "Samson" was not damaged. The "Samson's" tow consisted of three barges loaded with stone for the jetty at the mouth of the Columbia River; Barge No. 9 lashed to the "Samson" on the port side; Barge No. 8 lashed to the "Samson" on the starboard side and Barge No. 27 lashed to Barges Nos. 8 and 9 and extending directly in front of the "Samson;" each of these barges contained about 1,000 tons of stone.

The "Henderson" is a stern wheel steamer 180 feet in length, 31 feet beam and about 4 feet draft. The oil barge in tow of the "Henderson" is a sea-going steam barge designed to carry fuel oil in bulk; she is 280 feet long, has a beam 54.4 feet and a depth of hold of 23.4 feet; she is fully equipped in all respects except that she has no propelling power of her own. The "Samson" is 120 feet long, has 34 feet width of beam and 14 feet depth of hold; she is a sea-going tug with a right-hand propeller; Barges 8 and 9 are each about 150 feet in length, have about 38 feet width of beam and draw, when fully loaded, between nine and ten feet; Barge No. 27 is about 140 feet in length, has about 38 feet width of beam and draws, when fully loaded, between nine and ten feet. Barge No. 8 was uninjured; Barges 9 and 27 were both injured.

The evidence in the case is exceedingly conflicting, so that it may be said that it is impossible to reconcile

the evidence. Your Honors must, therefore, consider the stories as told by the several witnesses and from such stories ascertain, if possible, the responsibility for the collision. These stories may be sub-divided into three classes: first, the story of the pilot and crew of the oil barge and "Henderson;" second, the story of the crew of the "Samson" and of the barge tender; third, the story of the fishermen. Certain facts clearly appear to be admitted by all parties. These facts are:

(1) The "Henderson" with the oil barge in tow left Astoria at 8.45 P. M. on the 21st of July, 1911. Ebb tide started at Astoria at about 9:40 P. M., and, at the point of collision, about one and three-quarter hours later.

(2) The collision occurred at some point between Puget Island and Tenas Illihee Island in the Columbia River approximately twenty-seven miles from Astoria at the hour of 1:40 A. M. of July 22nd.

(3) The steam "Henderson" with her tow passed the steamer "Kern" with her tow shortly before the collision. These boats passed to starboard.

(4) The oil barge carried a green light on the starboard side and the "Henderson" a red light on its port side, and such lights are presumed to have been adjusted as required by law. The "Henderson" also carried masthead lights indicating that she had a tow. The "Samson" carried a green light on her starboard side and a red light on her port side in conformity with the requirements of the law, and masthead lights indicating that she had a tow. It is conceded that in addition

to these lights there was a bright white light on the starboard side of the starboard barge. The evidence on the part of the "Samson" and her crew also shows that there was a similar white light on the port side of the port barge, but the officers and crew of the oil barge and "Henderson" testify that they did not see such light on the port barge. The rules of navigation do not require that such light shall be carried, but it is conceded that such lights were carried, as a rule, on the tow of the "Samson."

(5) The navigation of the "Henderson" and her tow was directed entirely by the pilot on the oil barge, the helm of the "Henderson" being kept amid ships at all times until the collision occurred.

(6) The barges in tow of the "Samson" had neither motive power nor any means of steering themselves. They are propelled by the "Samson" and steered by the "Samson."

(7) Upon each of these barges comprising the tow of the "Samson" there is a barge man at all times and each barge was supplied with anchors.

(8) The "Samson" and her tow were seen by the officers and crew of the oil barge and "Henderson" when she rounded the point of Puget Island opposite Bugby Hole and at about the same time the "Henderson" and oil barge were seen by the officers and crew of the "Samson."

(9) At all times until within a few seconds of the collision both colored lights of the "Samson" were in

full view of the officers and crew of the oil barge and "Henderson," and both colored lights of the "Henderson" and oil barge were in sight, in like manner of the officers and crew of the "Samson."

(10) The night was clear but dark—no fog.

(11) The oil barge came to anchor about 300 feet from the Oregon shore and below the bluff and at anchor was tailing down stream toward Prairie or Clifton Channel.

(12) The oil barge gave the first passing signal of one blast of the steam whistle, indicating her intention to pass to port. This was promptly answered by the "Samson," but this signal was not given or exchanged until sometime after the vessels came in sight of one another.

(13) When the vessels were between 200 and 500 feet of one another the oil barge gave a second passing signal, also by one blast of the steam whistle and at this time the colored lights of each vessel were in full sight of the officers and crew upon the other vessel. The testimony of the officers and crew of the "Samson" shows that this signal was also answered in a like manner, but only one of the crew of the oil barge and "Henderson," the helmsman, testifies that he heard such answer, the other witnesses on behalf of the "Henderson" and oil barge testifying that they did not hear this signal answered, but do not say that no answer was given.

(14) The width of the river at the point of collision—whether the location claimed by the oil barge

and "Henderson" be regarded as the true place of collision, or whether the location of the collision made by the officers and crew of the "Samson" be taken—is between 2,200 and 2,500 feet and there is ample water for at least 2,000 feet of this width.

I.

THE STORY OF THE PILOT, OFFICERS AND CREW OF OIL BARGE AND HENDERSON.

The story of Edward Sullivan, Pilot, who had charge of the navigation of the "Henderson" and oil barge is substantially as follows: The vessel left Astoria at 8.45 P. M. and passed Skamokawa light, twenty miles distant, at twelve o'clock. When about four miles past Skamokawa light he was steering on a range light known as "Hunting Island Range" which light was astern of him, and this range light marks the dredged channel; at this time he was slightly above the lower point of Puget Island when he observed the lights of a steamer making the turn around the bend of the river; he saw both colored lights, also the tow lights and a single white light on one side; he at once recognized by the lights and the peculiar arrangement of the lights that the steamer he was meeting was the "Samson" with three rock barges loaded with rock, and he "at once made provision to pass her on the right hand side," and to indicate to her pilot that he intended to do so, he put his helm slightly to port, running off in a direction at an angle to the range until he reached a point which, in his judgment, was between 500 and 600 feet below the

range light; he then straightened up parallel with the range and steered for the high bluff—used the bluff as a mark to steer for; that when he had proceeded upon this course until he came within what he estimated to be one-half mile from the “Samson;” he then blew a long blast of the steam whistle on the barge and this was promptly answered by the “Samson” with one blast; each vessel continued upon its course; both lights of the “Samson” were showing and he so continued on his course until he reached a point where he judged his vessel was about 500 feet from the “Samson” and her tow; the relative position of the passing steamer seeming to be about the same; then he thought it was scarcely reasonable for him to turn further to the right on account of the shore and was becoming alarmed that there was danger of colliding with the bank and so he blew another blast of the whistle but does not remember whether it was answered or not; just prior to that time he asked the lookout who was standing on the bow if there was anyone who could handle the anchors if needed, and, having received an affirmative answer, felt no apprehension on that point; the course of the “Samson” was still unaltered and it appeared to him that there was some danger of their getting together, so that he then ordered the helm of the barge hard aport and swung into shore and told the watchman to stand by his anchor and he then disappeared and went below and he did not see him afterward; the barge answered the helm promptly and swung rapidly toward the beach, but the “Samson” came on past the bow and he saw that the barge would clear but that the tow of the “Samson” would

catch the "Henderson," so he then called to the pilot of the "Henderson" and ordered him to stop and back his helm to port full speed; the port barge of the tow on the "Samson" struck the bow of the "Henderson" just forward of the house, broke the "Henderson" adrift from the barge and left the barge free; he paid no further attention to the "Henderson" but immediately ordered the man below to let go his anchors, and this was promptly done. (Record, Vol. 1, pp. 91 to 111.)

This witness further testifies that the oil barge came up on her anchor chain without any jar that he heard and that she was then anchored about 150 feet from some old piling which is near the water line; that the oil barge did not move at all from the time of coming to anchor until the next morning when it was taken in tow by another boat; that the "Henderson" drifted away in the general direction of the channel and that her lights went out in a few minutes; that the captain of the barge, as soon as the anchors went down, launched a boat which went to the rescue of the "Henderson," but did not reach the "Henderson" until after the persons on the "Henderson" had been rescued by some fishermen; that the oil barge steered well; and that the width of the channel at that place from the high bluff across to Puget Island is shown by the chart to be about 1,800 feet. (Record Vol. 2, pp. 143 to 148.)

This is the story of the pilot having charge of the navigation of the "Henderson" and her tow and he may be said to be in the interested witness on behalf of the libellant.

The witness Sullivan was cross-examined, not only upon his testimony given upon this trial, but upon his testimony given before the inspectors. He admitted that when he was examined before the inspectors he had located the oil barge, when the "Samson" was first seen, considerably farther down stream but that when he remembered that the "Samson" was moving faster than the oil barge, he changed his testimony in regard to his position in the river when he first saw the "Samson," because he had placed the "Samson" nearer to his location of the point of collision than he had placed his own vessel (Transcript pp. 149 to 154). He admitted having passed the "Daniel Kern" to starboard and testifies that he passed the "Kern" about abreast of the Sand Bar (Transcript p. 155). The oil barge kept no log. On page 158 of the transcript he modifies his testimony given on direct examination and testifies that the only order he gave regarding the anchor was given after the second signal was given and that in his examination before the inspectors he had not mentioned this order at all. He testifies that he did not give any order to the helmsman to change the course at all when he blew the first signal; that he changed his course when he first saw the "Samson's" lights and then changed again after the second signal and that these were the only orders which he gave to change the helm. (Transcript pp. 160-161.) This witness was cross-examined at length upon the chart offered in evidence upon the direct examination. (Libelant's Exhibit 1.) Upon this chart he had located the position of the oil barge at the time the "Samson's" lights were first seen, the position

of the "Samson" at said time, the bluff on the Oregon side, and also the point of collision. He also indicated the Hunting Island Range lights and the line of lights, also the point where the oil barge was anchored, the point where the "Henderson" was aground; and on cross-examination he marks upon the chart the location of the oil barge when the first signal was given, the location of the "Samson" at that time, the location of the passing of the oil barge by the "Daniel Kern," the locations of the oil barge and "Samson" respectively at the time of the second signal and in making these locations he corrected the location of the "Samson" three times and the location of the oil barge once. (Transcript pp. 155 to 168.) On cross-examination he further testifies that he estimated the time between the second signal and the collision at about thirty seconds. (Transcript p. 175.) He further testifies on cross-examination (transcript p. 183) that he saw a light on the starboard rock barge, but did not see a light on the port barge; that he could not say whether the "Samson" answered his second signal or not; that he was very much occupied at that time (transcript p. 193); that he knew approximately where the rock barges were anchored the next morning, that they appeared to be anchored on the range in the neighborhood of the fishing traps, the location of which was fixed by the witness and one was anchored a little below the other two. Before the inspectors he testifies (transcript p. 199) that he estimated that the "Henderson" did not sink for two or three or five minutes and on page 201 that he had some apprehension of a collision at the time he gave the second signal—such an

apprehension that he took a chance of running his barge ashore rather than take the chance of having a collision with the "Samson" and her tow. He further testifies that he passed the "Kern" a quarter of a mile before he sighted the "Samson" (transcript p. 203) and on page 209 that the distance from where he thought he passed the "Kern" to what he deemed to be the point of collision was 3800 feet, and that he could run that distance in twelve minutes.

On re-direct examination he testifies that he remembers passing some fishermen, but does not remember swinging out of his course to avoid them, but he remembers that there was a fish boat between the "Kern" and the oil barge. (Transcript pp. 215-216.) At the request of the proctors for the libelant, the witness draws his course between the time he saw the "Samson" and the time of the collision, the line "F-G" on the chart representing his course swinging to starboard under a port helm after seeing the "Samson" that was coming with her barges and prior to the first signal; the line "G-H" representing the general course between the first and second signals, and the line "H-E" the course after the second signal. (Transcript pp. 216-217.) At the request also of libelant's proctors, he locates the "Samson" on the chart when he first sighted her at a point marked "K" and her position when the first signals were exchanged at the point "L," and her position at the time the second signals were exchanged the point "I." (Transcript pp. 217 to 220.) On page 232 of the transcript he states, upon re-direct examination, that the green light of the "Samson" was not shut out or

obscured until she passed the point where he was standing on the oil barge. On page 253 of the transcript, on cross-examination, this witness repeats that when he first saw the "Samson," his vessel was on the ranges, and further testifies (transcript p. 256) that there were no lights upon the boats by which he was able to see where the rock barge struck the "Henderson," but that all he saw was by the light of the night, and that from the course which the "Samson" with her barges was pursuing he would think that the center barge of the "Samson's" tow would also have struck the "Henderson."

During the examination of this witness by the proctors for the Standard Oil Company a chart "Exhibit 2" was introduced in evidence and upon this the witness located the oil barge as at the point "F" when the "Samson" was first seen and that at this point he put his helm to port. Upon the same chart he located the oil barge at the time he gave the first signal to the "Samson" at a point marked "1" and the "Samson" at that time at a point marked "L," and located the position of the oil barge at the time the second signal was given at a point marked "2" and the location of the "Samson" at that time at a point marked "I" and also located the point of collision (Transcript pp. 261-262).

STORY OF MARTINSON, THE BOATSWAIN

Martinson was the boatswain on oil barge No. 93 and was the lookout on the oil barge. He testifies that he came on watch at twelve o'clock. (Transcript p. 112). He testifies that the only order he remembers receiving

from the pilot was when he sung out "Let go the anchor," and that at that time he was about 40 feet from the anchor and that he promptly let go the anchor. He further testifies that when the anchors were let go they went out fast, but that when the anchors hit the bottom they went out slowly; that the oil barge had but little headway; that she came to anchor less than her own length from the Oregon shore, and remained at anchor at this place until the next morning; that when she came up on her anchor she came up very slow with no strain on the barge at all. (Transcript pp. 113 to 115.)

He further testifies regarding the orders to the helmsman. He testifies that after the first signal was given, the pilot told the helmsman to port his helm and the oil barge swung toward the Oregon shore at once. After the second signal was given, the pilot ordered the helm hard aport, and that he also ordered the pilot of the "Henderson" to port her helm and back her. He further testifies that after the helm of the oil barge was put hard aport, the barge was headed toward the Oregon shore, toward some very high land. (Transcript pp. 115 to 117.)

On cross-examination this witness testifies that he had no responsibility in the lookout part, but that he saw the "Samson" a long time before the first signal was given; he estimates the time about four to five minutes, and he estimates that about three minutes elapsed between the first signal given by the oil barge and the second signal; that after the second signal was given, the "Samson" was so close that he had become alarmed that there would be a collision; and that just

before the second signal was given, Captain Sullivan was heard to say "That man don't seem to alter his course. Give him another whistle." (Transcript pp. 119 to 122.)

STORY OF CHARLES KAYSER.

Charles Kayser was a seaman upon the oil barge and was wakened by the crash of the "Samson" running into the "Henderson." He testifies that he had heard one signal given by the oil barge and then fell asleep and that he heard another whistle given by the oil barge and fell asleep again after the second whistle. When he heard the crash he jumped out of bed and helped Martinson to let go the anchors, and that the anchors were let go very soon after the accident. He further testifies that the oil barge came up on her anchor chains very slow. (Record pp. 133 to 135.) He further testifies that he heard the signals given by the oil barge to the "Samson," but does not testify to having heard any answer to such signals. (Record p. 137.) He further testifies that he did not hear the passing signal exchanged between the "Kern" and the oil barge. (Record p. 137.)

STORY OF WILLIAM KALBERG.

Kalberg was the *helmsman* on the oil barge with the rank of quartermaster; he went on watch at twelve o'clock and steered the oil barge under orders from pilot Sullivan. (Record p. 2018.) Regarding the passing signals he testifies that he heard the oil barge blow one whistle and that afterward he heard the oil barge blow another whistle, and that this *second whistle was an-*

steered by the "Samson." Regarding the orders given him by the pilot, he testifies as follows:

Q. Did you get any orders at that time, or near that time? (Referring to the time when the first signal was blown by the oil barge).

A. Well, I can't think of it, whether it was exactly at the time that the whistle blowed that I got the order or if it was after the whistle blowed. I don't know what that is. But I know I got an order to port the helm a bit, you know, so I put her over a little, you know.

Q. Yes.

A. Well, then, to my best recollection, why he blowed another whistle. Then a thing I do remember, the "Samson" answered.

Q. What?

A. The "Samson" answered his second whistle that he blowed a little after he blowed his first whistle.

Q. Now, as I understand you, you ported your helm a little somewhere near the time of the first whistle?

A. Well, I could not specify at the time, or when it was.

Q. No.

A. But it was somewheres around that time, anyway.

Q. Well, then, what other orders did you get?

A. I can't remember.

Q. Regarding the wheel?

A. Well, then he blowed the second whistle, why, I guess he saw there was going to be trouble there, and he says, "Hard aport" then; so the towboat with these

barges was still bearing right on us then. Of course, then he asked me again, "Is it hard aport?" And I says, "Hard aport all the time;" and she was paying off, you know.

Q. How quickly did you obey Sullivan's orders as you got them?

A. Instantly.

Q. Now you said that you answered him that you answered him that you had her hard aport and she was paying off?

A. Yes.

(Transcript pp. 2020, 2021.)

This witness further testifies that he received no orders from the pilot after the collision and he heard the pilot give the order to drop the anchors instantly and that that was done a minute afterward. (Transcript p. 2022.)

He further testifies that he heard the anchors go out plainly, but took no notice whether the barge came up upon the chains with a jerk or not. (Transcript p. 2023.)

On cross-examination he testifies on page 2025 that he did not hear the "Samson" answer the first whistle, but that he did hear the "Samson's" second signal. On cross-examination (Transcript pp. 2028 and 2029) he further testifies that he saw the lights of the "Samson" and her flotilla at the time the first whistle was sounded but did not see the vessel; that somewheres after the first signal was sounded, or in the neighborhood of that, the pilot ordered him to port the helm, that he obeyed that order and got no other order until the second signal

was given. On page 2030 he testifies that though he saw the lights of the "Samson," he cannot say how many lights he saw nor the color of the lights; and on page 2031 he says that the "Samson" did not appear to change her course at all and that he does not remember seeing either the red or green light of the "Samson" that night.

STORY OF CAPTAIN C. B. SORLEY.

This witness was the master of the oil barge; he was asleep at the time of the collision and was aroused by one long whistle from the "Henderson" which he construed to be some danger of collision. The sleeping quarters were on the aft end of the barge. He saw the "Samson" and her tow sheering off from the "Henderson" at the time he got on deck, but did not know how many tows she had. As soon as he got on deck he gave orders to let go the anchors and the same orders were given about the same time from the forward end of the barge. (Transcript p. 2039, 2040). He testifies that the anchors were let go very promptly (p. 2040) and that when the barge came to anchor she was about 280 feet from the Oregon shore. This witness further testifies that the "Henderson" sank about a mile away from the oil barge and that all her lights went out in three or four minutes after he came on deck.

No other person who was on the oil barge was examined.

STORY OF HENRY F. STAYTON.

This witness was the pilot on the "Henderson" and on duty at the time of the collision, acting under orders

from the pilot of the oil barge. The helm of the "Henderson" was kept midships. He went on duty at 1:20 by the pilot house clock and at that time the "Henderson" was on Hunting Island Range lights about abreast of lower Puget Island. (Transcript pp. 487 and 488.) He testifies that at this time the "Samson" was not in view, but came in view shortly after he went on watch. (Transcript p. 489.) He testifies that he noticed his vessel swinging off to starboard; that she swung off the range lights and opened them up fairly well, but that he had some apprehension that they were going too far over, as he feared they might strike the shallows at the head of Tenas Illihee Island, and that though they were pretty well over and the range lights opened up pretty well they steered a course about parallel with the range lights. (Transcript p. 490.) This witness testifies that he heard one whistle given from the oil barge and heard the same answered immediately by the "Samson;" shortly afterward the oil barge gave another whistle, but that he does not remember hearing any answer to that. When the whistles were given they were on the starboard side of the range lights. (Transcript p. 491.) He testifies that he saw the "Samson" come around the point of Puget Island, saw her green light and two masthead lights and the light on the starboard barge—a white light—and soon afterward saw the red light, and that the red and green lights remained in view up to the time of the collision. (Transcript p. 492.)

This witness further testifies that the port barge of the "Samson's" tow struck the "Henderson" on the port bow, about the corner of the house, and that he

did not see any barge strike the oil barge. (Transcript p. 494.) On page 495 he testifies that within a few seconds before the crash he gave the danger signal for the purpose of warning the "Samson" and to wake up the crew, and that about the time of the second signal it appeared to him that there was going to be trouble, so he waked the master or captain of the "Henderson" and when the captain came into the pilot house he gave place to the captain (transcript p. 496.) On cross examination he testifies that when he came on duty the vessels were off from the lower end of Puget Island; a little below that probably (transcript p. 504), and that at that time he noticed the range line and the vessels were on the range lights. He testifies that three or four minutes probably after he came on duty he saw the "Samson" come around the point of Puget Island, and that about fifteen minutes after he came on duty the first signal was given by the oil barge and answered immediately. (Transcript p. 505.) On page 506 he testifies that Captain Sullivan was on the forecastle head of the oil barge, about 180 or 190 feet from where he stood in the pilot house but that *it was so dark he could not see him*; and on page 506 he testifies that from the location of the barges as they approached the "Henderson," *the center barge of the "Samson's" tow would have struck the "Henderson."* On page 511 he testifies that he estimated that the course on which the oil barge and the "Henderson" were running parallel with the range lines was distant from said range lines about 400 feet. This witness was examined before the inspectors and cross-examined in regard to the testimony

which he gave before the inspectors. He admits that before the inspectors he testified that the collision occurred below the seining ground on the Puget Island side about abreast of Little Slough and that he judged that was the place of the collision from the position of the oil barge the next morning. (Transcript p. 517.) This testimony was repeated more than once before the inspectors. (Transcript p. 519.) On page 520 he testifies upon this trial that when he noticed the "Samson's" lights he was just swinging down off the range. Before the inspectors he also testified (transcript p. 522) that when he first saw the "Samson" she looked like she was nearer the Island side, but he could not tell very well on account of the darkness.

This witness, on cross-examination, further testifies that there was a rope fender between the "Henderson" and the oil barge and that this rope fender was at a point on the starboard side of the "Henderson" about opposite where the "Henderson" was struck. (Transcript p. 526.) He further testifies on cross-examination that he saw the rock barges at anchor the next morning as he was standing at the time on the oil barge and that, in his judgment, the rock barges were anchored somewhere off Puget Island. (Transcript pp. 535-536.) In his examination before the inspectors (transcript pp. 541-542) he testifies that the rock barges were anchored on the starboard side of the range as you go down—a little nearer to the Island shore than to the Oregon shore and pretty well over to the Island.

STORY OF WITNESS HENRY KNESS.

This witness was the fireman of the "Henderson." He testifies that he heard the stop bell, the reversing bell and the backing bell, but heard no other bells. Though he was on watch he was not examined in regard to the passing signals.

STORY OF WITNESS CHRISTOPHER O'BRIEN.

This witness was chief engineer upon the steamer "Henderson," but was not on duty at the time of the collision but in his room. He testifies that the first he knew of the collision was the crash. (Transcript p. 575.) He estimates (transcript p. 578) that it was at least three minutes after the crash before the "Henderson" sank, and on page 579, that from the condition of the "Henderson" she could not have done any real effective backing after the collision.

STORY OF WITNESS PHIL CROSSEN.

This witness was the *watchman* on the "Henderson" at the time of the collision and he testifies that at the time of the collision he was standing on the bow of the "Henderson" near the stem (transcript p. 1226), that from that place he went out on the upper deck, stood there awhile and then jumped on the oil barge. Prior to the danger signal he testifies (p. 1227) that he was *in the galley of the boat*. He testifies that though he was watchman, he paid no attention to the lights on the "Henderson" and her tow. (Transcript p. 1228.) On page 1229 he testifies that he saw the port barge strike

the "Henderson" right by the house cavil and did not see any other barge strike. He further testifies that he heard the three bells on the "Henderson," that he was standing on the oil barge when she anchored, that the anchors were loosed in one-half a minute and that the oil barge was drifting down stream. (Transcript pp. 1230 to 1232.) Though he was the lookout on the "Henderson" he admits that he did not know where they were in the river, that he heard signals from the oil barge but no answer from the "Samson." (Transcript pp. 1232 to 1233.) On cross-examination this witness testified that he paid no attention to the red or green light on the "Samson," that he saw one light on one of the barges of the "Samson's" tow, that he did not think the light was on the port barge because that barge was the nearest to him and he saw no light on it, but there was a light on the second barge from that one. This light, he testifies, he saw before the collision. He further testifies that he *did not see but two barges in the "Samson's" tow, and that the barge which struck did not have any light on it and was the one farthest in front.* (Transcript pp. 1238-1239.)

STORY OF JOE OLESON.

This witness was assistant engineer on the "Henderson" on the night of the collision and was on duty. He testifies (transcript p. 480) that he don't remember hearing the passing signals, that he got one bell, a stop bell, a reverse bell and full speed astern; that after that he got a stop bell and then a go ahead bell and then another back up bell; that he obeyed these bells but that

the boat had no power at that time. (Transcript pp. 480 to 482.) The same witness (transcript p. 482) testifies that the "Henderson" was torn loose immediately by the collision and that he could not see either shore. On page 483 he testifies that when he slid into the water from the hurricane deck of the "Henderson," he came up, caught on something and climbed around on the hull, saw the "Samson" and that she was over toward the Puget Island shore. This, he states, was three minutes after the collision.

STORIES OF THE FISHERMEN.

Charles Johnson, the first fisherman who seems to have been passed by the "Henderson," testifies that the "Henderson" passed him about three-quarters of a mile below the point of collision, just below Cathlamet Slough and above the sand bar (transcript pp. 386-387); that the "Kern" passed when he was on the tow head (transcript p. 388) and that he laid out his net just after the "Kern" passed him. He testifies that it takes five minutes to run from the tow head to the point where he begins to lay out his net, the laying out of the nets takes seven minutes and the drift thirty minutes and that the time from tow head to tow head would average about an hour and ten minutes. The "Henderson" passed him to starboard and was on the range line when she passed. He didn't hear the passing signals between the "Henderson" and the "Samson." He estimates that at the tow head the range line is about 900 feet away. (Transcript p. 403.) He testifies that he didn't see the "Samson" when the "Kern" passed. This witness fin-

ished his drift and did not drift again until seven A. M. (Transcript p. 410.) He testifies that at that time the stone barges were still anchored and locates all three barges upon the chart. (Transcript pp. 410-411.) He testifies that he saw the "Samson" pick them up but paid no attention to it. (Transcript p. 412.) He locates the one barge 600 feet from the Puget Island shore and the other two barges 900 feet from the Puget Island shore, and testifies that when the "Henderson" passed him, she passed at just about the spot where the one barge was anchored the next morning. (Transcript p. 413.) It does not appear who was in the boat with this witness, and, so far as the record shows, such person was not called as a witness.

Eddie Grove and Martin Loaland were fishing from the same boat. They were both called as witnesses. Eddie Grove testifies that he saw the "Kern" pass but don't know anything about when. It appears from the testimony, however, of Ole Grove that Eddie Grove and Martin Loaland had the turn in fishing next to Charles Johnson and Charles Johnson laid out his net after the "Kern" passed, from his own testimony. This witness also testifies that between turns the time is usually fifteen to twenty minutes. Eddie Grove testifies that he had just finished laying out his net when the "Henderson" passed him and was just below the tow head—the end of his net even with the range lights—and that the "Henderson" passed to starboard. (Transcript pp. 287-288.) He testifies that he saw the "Henderson" gradually swing toward the Oregon shore and far over (transcript p. 289) and that he saw the

"Samson" just after the "Henderson" passed. (Transcript p. 290.) He testifies that he heard the first signal and the answer and the second signal but don't remember hearing the answer, that he heard the danger signal, the crash and the noise of the anchor chains. (Transcript pp. 290 to 292.) He testifies that he finished his drift, then went to the tow head and then to the "Henderson" and locates the "Henderson" at that time as above the point of Tenas Illihee Island. (Transcript pp. 292-293.) He testifies that after he left the "Henderson" he laid out his net again and ran close to the rock barges which were anchored and he locates the rock barges and the point where he started to lay out his net on the chart. He testifies that two rock barges interfered with his laying out his net as they were on the Oregon side of the ranges. (Transcript pp. 294-297). This witness testifies that he could see the "Henderson" and the oil barge all the time and could see not only their lights and the mast of the oil barge, but the form of the boats up to the time of the collision. (Transcript pp. 308 to 312.) He testifies (transcript p. 311) that when the crash came he was at the lower point of Puget Island, and when he finished his draft he came back to the tow head. He testifies that he does not remember seeing any rock barges when he came up to the tow head. (Transcript pp. 316-317.) He locates the rock barges in the river upon the chart. (Transcript pp. 314 to 318.) He testifies that he saw no lights on the rock barges (transcript p. 321) and that he paid no attention to the "Samson's" lights. He testifies that he was on the tow head when the "Samson" picked up

the barges and that the tow head was not 1,000 feet from the range light and about 40 fathoms from the shore of Puget Island. He testifies that the danger signal, the crash and the noise of the anchor chains were heard by him at about the same time, and that the collision, in his judgment, took place right out from the bluff on the Oregon side of the stream, pretty close in. (Transcript pp. 291-292.)

The witness, Loaland, in the boat with Eddie Groves testifies substantially as the witness Eddie Groves does, in regard to the passing of the "Henderson"—the passing signals between the "Henderson" and "Samson," the danger signal, the crash and the anchor chains. He testifies substantially, as Eddie Groves does, regarding the finish of the drift, going back to the tow head, going to the "Henderson" and as to the location of the "Henderson" at that time. (Transcript pp. 322 to 336.) He testifies that he saw the stone barges—two lying on the Oregon side fifty fathoms from the range line and the other barge on the Washington side near the sand bar. (Transcript pp. 337 to 339.) He testifies that when they heard the first passing signal they were below the point of Puget Island (transcript p. 344); that he did not see the "Henderson" at the time of the collision (transcript p. 345); and that the "Henderson" at that time was about a mile away. He testifies that after finishing their drift they passed the one stone barge near the sand bar (transcript p. 347) and that they came up on the Puget Island side about fifty fathoms from the shore (transcript p. 348). He testifies that he first saw the "Samson" in Bugby Hole, but

don't remember what lights he saw. (Transcript p. 355.) In going from the tow head to the "Henderson" he testifies that he passed below two barges, but he does not remember any lights on any of the barges. (Transcript p. 350.) He does not remember seeing the red or green light of the "Henderson" and oil barge. (Transcript p. 369.)

The witness Elias Dahl and Ole Grover were fishing in the same boat. Dahl in his testimony (transcript p. 356 to 386) testifies that he saw the "Henderson" from the tow head and saw the "Samson" from the tow head coming around the bend in Bugby Hole; that he noticed the course of the "Henderson" hauling over toward the Oregon shore; that he heard the "Henderson" blow one whistle and heard the answer; that he heard the "Henderson" blow another whistle, but don't think he heard it answered; that he heard the danger signals, the crash of the collision and the anchor chains; and that the danger signal, the crash and the anchor chains came altogether. (Transcript, pp. 357-358). He saw the "Daniel Kern" but does not give any particulars about it. (Transcript, p. 359.) He saw the two barges after they were anchored, but not the one barge, and noticed that the two barges were on the Oregon side of the range lights,—he estimates about fifty fathoms. (Transcript, pp. 359-360.) He testifies that he went to the "Henderson" with Ole Grover and *that they did not take any people off the "Henderson," and locates the "Henderson" at that time as a little below the bluff and thinks they reached the "Henderson" four or five minutes after the collision.* (Transcript, p. 360.)

He testifies (Transcript, p. 362) that he didn't see the boats at the time of the collision, but saw shadows and lights, and states that they were a little below some trap piling near the bluff on the Oregon side. (Transcript, p. 362.) On cross-examination (Transcript, p. 365) he testifies that he had not seen the "Samson" when he first saw the "Henderson"; that *when he first saw the "Samson" the "Henderson" was about abreast the lower end of Puget Island* and the "Samson" had just come around the bend up the river. He testifies that he saw the bright lights of the "Samson" over the woods, *afterwards saw the red lights of the "Samson" but never saw any green lights on the "Samson."* (Transcript, pp. 366-367.) He testifies (Transcript, pp. 368-369) that he did not see the red light of the "Samson" at the time of the first signal nor at the time of the second signal, and does not remember seeing any colored lights on the "Henderson," or remembers seeing any lights on the oil barge. He testifies (Transcript, p. 371) that only a few seconds elapsed, in his judgment, between the second signal, the danger signal, the crash and the noise of the anchors. He testifies (p. 372) that when he reached the "Henderson" there were no lights on the "Henderson," and that she was on the bottom, but not in the same place at which she was the next morning. He testifies that he did not see the rock barges when he went over to the "Henderson" but saw them when he came back from the "Henderson." (Transcript, p. 374. He testifies (Transcript, pp. 377-378) that he did not see the "Samson" pick up the rock barges; that one rock barge was anchored below the sand bar. He

testifies (p. 379) that he looked at the range of lights when he went over to the "Henderson" and when he came back from the "Henderson," but not for the purpose of determining on which side of the range lights the rock barges were; that he looked at the range lights at the time he saw the rock barges. He testifies (Transcript, p. 382) that he does not know whether the "Samson" had a line on the "Henderson" or not. On page 383, upon his re-direct examination, this witness repeats and *insists that he saw the red light of the "Samson" when she came around the point of Puget Island*, and on page 385 insists that he does not know of their taking any passengers off the "Henderson."

Ole Grove testifies (Transcript, pp. 417 to 434) and again on pp. 452 to 479; he was Dahl's partner, and they were lying at the tow head waiting their turn and saw the "Henderson" when she came up the river and the "Samson" when she came down. He testifies (Transcript, p. 419) that when he first saw the "*Henderson*" she was *a little above the range lights,—about half way between the range lights and Puget Island*; when she passed the tow head she made a turn to pass the boat in which Eddie Grove was, and after she passed Eddie she turned a little back toward the Oregon shore. He testifies (Transcript, p. 421) that the "Henderson" went over to the Oregon shore, but he did not think she was going too far over; that he saw the "Samson" and that the "Henderson" passed that fisherman and then *as she passed him*, about abreast of the tow head, *the "Henderson" blew the first whistle* and that this whistle was answered by the "Samson," and that from there the "Henderson" and

the oil barge kept on their course "kind of" on the Oregon shore, and then in a little while the signals were blown from the oil barge or "Henderson" and then they paid no particular attention until there were three or four more whistles blown. On page 422 he says: The "Samson" came down and didn't seem to change its course at all; then he heard three or four whistles, a crash, the anchors and saw the "Samson" put a search light on the "Henderson" and saw the "Henderson" sink. Then he, with his partner, went over to the "Henderson" as fast as they could go. On page 423 he says he passed near the "Samson" and the stone barges on his way over to the "Henderson," and that some one on the "Samson" spoke to them, that *they took three people from the "Henderson,"* and that at that time the "Henderson" was sunk and lying on her side. He estimates that it took five minutes for him to reach the "Henderson." On page 424 he testifies that he could see the lights of the boats when they collided and that, in his judgment, the collision occurred about fifty feet below the bluff on the Oregon side,—just about the same place where the oil barge was anchored the next morning. On page 426 he testifies that they did not make another drift that night, that they saw the stone barges were in the road and went home and had breakfast, after which they came back again, and at that time he saw stone barges about seventy-five fathoms on the Oregon side of the range opposite the tow head and saw the "Henderson" (Transcript, p. 428) lying a little above the point of Tenas Illihee Island. On page 454 he testifies that from the tow to the mouth of Grove's Slough is about three-

quarters of a mile; that from the tow head to the bluff on the Oregon side is a little over a half mile; from the tow head to Tenas Illihee Island more than half a mile; from the tow head to the range line is 110 fathoms; that he first saw the "Henderson" about abreast the point of the island passing the fisherman Charlie Johnson, and that at that time she was above the range lights. On page 457 he testifies that when the "Henderson" passed Eddie Grove she was a little below the tow head,—about sixty fathoms,—and on page 458 that the "Henderson" got back on the range lights about abreast of the tow head and that when he first saw the "Samson" the "Henderson" had just passed Eddie Grove. On page 459 he testifies that the "*Henderson*" *gave the first signal when she was a little above the tow head and was then on the range line; that at that time he saw the green light on the "Samson,"* also two head lights and lights on the barge, but *that he could not see the red light.* On page 460 he testifies he saw these lights at the time the "Henderson" gave the first signal. On page 462 he testifies that he *could not see the outline of the "Henderson" and oil barge* but could see the bright lights on the boats, and that when the second whistle was blown all that he could see were the lights, and that at that time he saw the bright lights on the "Samson," the green light and two head lights and one or two lights on the stone barges, but did not see the red light of the "Samson" at all. On page 463 he estimates that when the "Henderson" gave the second signal it was 300 fathoms away from him and that he did not notice the "Samson" answer this signal. On page 464 he says that at that time

the boats were half or three-quarters of a mile away from him. On page 465 he testifies that *when he went over to the "Henderson"* he passed the "Samson" and the "Samson" *was backing out of her scows from the "Henderson,"* and that the "Henderson" at that time was laying bottom side up and a *quarter of a mile above where she was the next morning.* On page 467 he testifies that a row boat came over from the "Samson" and got to the "Henderson" about the same time he reached the "Henderson," and that the "Samson," when she reached the "Henderson" put a line on her. On page 468 he testifies that the "Samson" was trying to pull her back into the channel. On page 469 he testifies that when he went over to the "Henderson" he passed below the "Samson" and saw all three rock barges, but one was a bit farther down than the others, and that he did not know whether this one was attached to the "Samson" or not, but that the other two farther up were attached. On page 470 he testifies that *at that time the "Samson" was about fifty feet from the "Henderson."* On page 471 he testifies that *he did not notice the lights on the rock barges* at that time and that he does not think the rock barges were anchored at that time. On page 472 he testifies that after getting the people from the "Henderson" on the "Samson" he went to lay out his net, but did not lay out his net because he concluded the rock barges were in his way and that at that time the rock barges were anchored and lying about seventy-five fathoms on the Oregon side of the range lights and that the next morning when he came to lay out his net the rock barges were gone.

THE STORY OF THE OFFICERS AND CREW OF THE SAMSON AND KERN.

Charles Jordan, the pilot who had charge of the navigation of the "Samson" and her tows at the time of the collision, testifies that when he came on duty the night of the 21-22 July, 1911, he looked around at his vessel and her tows and that there was a white light on the bow of the port scow, a white light on the bow of the starboard scow, two white mast head lights, a red light on the port side of the "Samson," a green light on the starboard side of the "Samson" and a light aft on the "Samson" on the mainmast. (Record, pp. 589-590.) He testifies, page 592, that he saw the "Kern" almost continuously from the time he was between Pancake Point and Coffee Island until she went into Bugby Hole; that as she went around the point of Puget Island he lost sight of her and that he was then about half way between Pancake Point and Coffee Island; that he saw the "Kern" again after she rounded the lower point of Puget Island at Bugby Hole; that before rounding the point of Puget Island he gave one long blast of the whistle. On pages 593-594 he testifies that in rounding the point of Puget Island he had to haul well over to the starboard side of the channel going down, as there a fisherman who showed him a red light when he was abreast of Bugby Light; that he turned the point of the island close to the Puget Island side on a port helm. When he turned to the point of the Island he saw the lights of the "Kern" again and saw what afterwards proved to be the "M. F. Henderson" and Oil Barge No. 93; that he heard the passing signal exchanged between the "Henderson" and

“Kern” after he got in sight of them around the point of Puget Island and that, in his judgment, the “Kern” passed the “Henderson” and oil barge about the lower point of Puget Island where the Cathlamet Slough comes in. On pages 595-596 he describes his course, after he turned the point of Puget Island, as follows:

“A. Well, I told the man at the wheel to steer for the Upper Skamokawa light, as he always did, and then I had seen these boats coming, so I told him, as long as we was well over, we better hold up that way a little to steady her up there; so we steadied up, headed a little above Skamokawa upper light. Shortly after that the oil barge gave one whistle, so I told him to port; she was going down with the ebb tide, setting over all the time; and the oil barge didn’t seem to change her course any, so I says ‘Port a little more, John.’ That fellow is steering bad, anyhow we will give him plenty of room, keep off going down. I could see both red and green lights. I said, ‘John, by Jingo, there is something wrong with that fellow. He don’t seem to move at all. He holds right in the course; there is something wrong.’ I says, ‘Port again, she is coming.’ Shortly afterwards the oil barge blew another whistle and I answered and I said ‘Hard aport.’ John says ‘Hard aport now.’ I heard the bell ring, put my hand on the dial, saw she was hard over and the boat was swinging. I just let go the whistle cord; as I let go I happened to glance at the compass and saw she was headed around north half east. The boat was still swinging on the screw. Wasn’t only a few seconds between the last whistle until the crash

came. I was well in towards the Puget Island side then, just a little below Mr. Ostervolt's seining house.

Q. Had you at that time gone down on the Hunting Island range lights?

A. No, sir, I never got onto the ranges at all.

Q. Did you observe those ranges that night?

A. Yes, sir.

Q. What was their condition as to being open or not?

A. *They were well open on the upper side. In fact I never get on the ranges until I get further down than where the collision took place that night. Never come on the range until I was further down than we were that night.*

Record pages 597 to 599 he testifies that when the "Henderson" and her tow gave the first passing signal he thinks they were half a mile away; that he answered this signal immediately; that when the second passing signal was given he thinks the vessels were not more than 400 or 500 feet apart; that he answered this signal promptly; that at this time he saw both the red and green lights of the "Henderson" and her tow; that at this time his helm was hard aport, and as soon as he answered the signal he gave the signal to back; indeed, that he thinks he gave the signal to back before he answered the second signal; that at that time the reflection of the white lights from each of the barges—port and starboard—were visible; that at that time he thinks he was 700 or 800 feet off the Puget Island shore, a little below Mr. Ostervolt's seining house where he lives and just below Grove's Slough; that he could see up the Slough

and saw a scow house there tied to the bank. On page 601 he testifies that at the time of the collision he was 300 feet above the range line toward the Puget Island side. On page 602 he testifies that the port rock scow hit the off barge a glancing blow, forward and slid along the oil barge and hit the stem of the "Henderson," and that at about the same time she hit the stem of the "Henderson," *the middle rock scow struck the "Henderson" just under the forward port house*, and when the "Henderson" was struck by the center rock barge the bow of this barge was about 175 feet from where he stood. On page 603 he testifies that the "Henderson" was broken loose immediately; that the "Henderson" was backing; that she broke loose and went around the stern of the oil barge; that the oil barge kept on her way; *that about three minutes afterwards he heard the anchor chains go out*; and that *at that time the oil barge has passed him quite a way*. On page 604 he testifies that immediately after the collision he ordered the "boys" to get the boat over right away and to cut loose from the scows or anchor the scows. Some of the crew ran forward and anchored two of the scows; that he saw the man on the port barge and instead of anchoring the scow immediately he went forward and took a light, set that down and picked up the one that had been on the bow of his barge and went down to examine the scow; that at this time the lines of this barge were off; that the mate and two sailors got into a boat and went to the "Henderson"; that while alongside the two scows, some fishermen came out, and that he told him to hurry to the "Henderson"; that at this time he was lying on the starboard side and the pas-

sengers were on the guard or the scow; that he turned the searchlight on and saw the passengers there; that as soon as he got loose from the scows he went to the "Henderson"; that she was drifting toward Tenas Illihee Island; *that in going to the "Henderson" he noticed the range lights, and that he had to cross the range lights to get down to where the "Henderson" was*; that when he got to the "Henderson" he put a line on her, and that at that time she was a little below the ranges; that he put the head line on her and towed her toward Tenas Illihee Island; that he stood by the "Henderson" for about an hour and a half after she grounded to keep her on the beach so that when the tide fell she would stay; that he thinks after the collision took place, the "Henderson," between the towing and shoving of the "Samson" and her own drifting, went about two-thirds of the way across the river toward the Tenas Illihee side. On page 607 he testifies that after leaving the "Henderson" the next morning, they took the passengers up to the oil barge where she was anchored up under the bluff at Bugby; that they then went back and picked up the three rock barges,—picked up No. 9 first, which at that time was way down on the edge of the sand spit, the lower end of Puget Island well into the beach, in his judgment, not more than 150 or 200 feet from the beach; *that she was in shoal water and that they kicked up mud in getting her away*; that then he went up to the two barges anchored above and picked them up; that they were just abreast of the small slough at the lower end of the Ostervolt seining ground; that they were anchored, had lights burning and were between 300 and 400

feet off the beach on the Puget Island side; that at this time it was fairly light. On page 609 he testifies that when he went over to the *oil barge she was anchored*; that the anchors went out from forward and *that she tailed toward Clifton channel*,—right toward the Oregon shore off the beach probably 300 feet. This witness testifies that oil barge No. 91 and oil barge No. 93 are practically the same! that he landed one of these oil barges at the dock at Portsmouth; that *he stopped his boat half a mile from the landing place*; that he had had experience in towing sea-going vessels, and that in his judgment, if such a vessel as oil barge No. 93, moving at the rate of three or four miles an hour, were suddenly cut loose from the tug boat, she would drift at least a mile in still water and that *she would drift at least a quarter of a mile against such a current as prevailed in the Columbia river at the time and place of the collision*; that he does think that if the “Henderson” backed for a minute before the collision, the backing would have had little effect upon the momentum of the oil barge; that he was mate at one time upon the “Henderson” and acquainted with her; that in his judgment the *breaking of the lines* with which the “Henderson” was lashed to the oil barge would cause a slight jar and *would not retard the momentum of the oil barge appreciably*; and that, in his judgment, the *oil barge cut loose from the “Henderson” under the conditions which prevailed that night, would go a quarter of a mile*. On pages 619 and 620 he testifies that when he saw the oil barge the next morning after the accident some paint had been freshly rubbed off and that there was black and yellow paint

on barge No. 9 where she had struck the oil barge; that the next morning after the accident he examined the port scow, No. 9, and that it had a dent in the bow and some other injuries; that the middle scow, No. 27, had the deck torn loose from the stanchions and some of the rock were moved on the deck. On page 621 and following this witness' attention was called to libellant's Exhibit 1 and particularly to the several notations made on this exhibit by the witness Edward Sullivan, and testifies that if the oil barge was at the position shown on the chart by Captain Sullivan at the time when he first sighted the "Samson," *the only colored light on the "Samson" which would have been in sight would have been the green light*; that if the oil barge was in the position marked "X," which is the place at which she was located by Captain Sullivan at the time the first passing signal was given, the *only colored light* on the "Samson" which would have been *visible was the green light*; that if the oil barge had been at any of the positions marked by Captain Sullivan on the chart at which he testified she was at the time of the second whistle was given the *only colored light* from the "Samson" which would have been *visible* to the oil barge was *the green light*. On pages 625 and following this witness located on libellant's Exhibit 1 the place of the collision, the place where the two rock barges were anchored the next morning, the place where the "Henderson" was when he left her the next morning; and on the chart, claimant's Exhibit A, this witness, pages 626 the following, locates where the "Samson" was when he first saw the oil barge, where the oil barge was at the time when the

collision occurred, where the two rock barges were picked up the next morning, where the third rock barge was picked up the next morning, the Upper Skamokawa light and Bugby light. On page 628 he testifies that he did everything he could think of to avoid the collision, and on page 629 he testifies that if the port barge of the "Samson" so struck the "Henderson" as claimed by the libellant, it would have left nothing of the "Henderson." On pages 630 and following of the record the witness testifies that if the "Henderson" and her tow were run on the course indicated by Captain Sullivan between the point where he first saw the "Samson" and the point where the collision took place; and the "Samson" was running on the course pointed out by Captain Sullivan from the point where he locates the "Samson," to the point of collision, the only light of the "Samson" which would have been visible to the "Henderson" would have been the green light and the only light of the "Henderson" and the oil barge which would have been visible to the "Samson" would have been the red light; and that if the two vessels were running on these two courses as claimed by Captain Sullivan, in his judgment, the white light on the port barge of the "Samson's" tow would have been obscured by the rock on the center barge. On pages 633 and following, this witness testifies that if the oil barge and "Henderson" were at the place where he locates them when he first saw them, the "Samson" at the place where he first locates the "Samson" when he first saw the oil barge and the "Henderson" and they had pursued the courses which the witness testifies to, all the lights of

the oil barge and "Henderson" would have been in sight at all times, though the green light might have been shut out a part of the time when the vessels were about 100 feet apart. On pages 637 and following the witness testifies that he is acquainted with the manner in which towing is conducted on the Columbia river in going up and down the river around Puget Island; that *tow boats towing up stream usually keep toward the Puget Island side*; that he has *several times watched Captain Sullivan when he was towing along that Island and that he kept on the Puget Island side of the ranges*. On page 638 the witness testifies that he has several times been present when vessels like the "Samson" and "Kern" and other boats have hit barges, and that, in his judgment, the striking of the bow of barge No. 9 by the stem of the "Henderson" in the manner in which he describes, would possibly not have had much effect upon the stem iron.

STORY OF HANS JENSEN.

The testimony of this witness is found in the record on pages 787 to 795. He was on duty as engineer at the time of the collision and in charge of the engine. He testifies, page 788, that at or just before the collision he got four gongs and one jingle, which means to run the boat from full speed ahead to full speed astern; that he felt the shock by the collision very slightly; that he obeyed the bells at once. On page 789 he testifies that while backing up he got a stop bell, and that he thinks about ten minutes thereafter he got another backing bell and that at this time some of the rock barges were alongside of the "Samson." On pages 790 to 791 he tes-

tifies that he saw the rock barges when they were picked up the next morning; that two of the barges were lashed together and were picked up last; that these he didn't pay any attention to and cannot locate, but the other barge which they picked up first was so far down that he could see Cathlamet looking up Cathlamet channel, and that it was about one barge length from the Puget Island shore. On page 792 he testifies that he went on duty that night at twelve o'clock and remained on duty until six in the morning when he was relieved by the chief engineer. On page 794 he testifies, on cross-examination, that he did not hear any of the whistles of the "Henderson" or the oil barge, but heard both signals from the "Samson."

Frank H. Goodell was the chief engineer upon the "Samson"; he went on duty at twelve o'clock, and at the time of the collision was in bed aft on the upper deck, the door of his room opening forward, swinging from the starboard side and the opening shuts out the view from the port side. He heard the bells on the "Samson" from full speed to full speed astern; *went out of his room facing the starboard side; saw the shore; located himself; started across the other way to look and saw the oil barge slide by.* (Transcript, p. 797.) He did not see the impact. He heard the two signals from the "Samson," but did not hear the signals from the "Henderson." He testifies that when he located himself, he thinks *he was about 300 feet from the Puget Island shore.* (Transcript, p. 798.) He locates the "Samson" at that time on the chart, claimant's Exhibit

B, as about opposite a small slough. (Transcript, p 799.) When the oil barge went by him he did not watch her farther, but went down to the engine room and then went on deck again and aided in casting off the starboard stern line which reached from the starboard corner of the starboard barge to the after starboard quarter of the "Samson." (Transcript, p. 801.) *He heard the rock barges anchored* and remembers the "Samson" backing out from them after they were anchored; *he did not hear any anchors on the oil barge.* (Transcript, p. 802.) He knows that the "Samson" put a line upon the "Henderson"; thinks that this was done ten minutes after the collision, and thinks that the "Samson" dragged the "Henderson" 600 or 700 feet. (Transcript, p. 804.) He testifies in regard to picking up the barges the next morning; No. 9, the port barge, was first picked up and he testifies that she was well down toward the sand bar at the foot of Puget Island and approximately 200 feet from the shore and was anchored. (Transcript, p. 805.) He also was present when the other two rock barges were picked up by the "Samson" and testifies that they were 600 or 700 feet above the one barge, probably 300 feet from the Puget Island shore and anchored a little below the mouth of a little slough around which he testifies the collision occurred. (Transcript, p. 806.) He examined the two rock barges the next morning and found No. 9—the port barge—not injured much, the guard around the nose turned up and broken somewhat. The middle barge, No. 27, had its bow stove in and the top hatch torn off. (Transcript, p. 808.) On page 811 he testifies further regarding the injuries to the port

barge and the center barge, and says he noticed black paint over the guard of the port barge where it was rolled up. He testifies that those injuries were not on the barges at the time when he examined them a few days before. On page 829 of the transcript he locates where the *oil barge was anchored* the next morning and testifies that she was *anchored right below the bluff tailing down toward the old fish trap into Prairie channel* and about 300 feet from the shore. On page 848 he testifies that he thinks the stone barges were anchored in five minutes and that the "Samson" was not manipulating them but drifting. On page 856 he testifies that when they *picked up the barges they were so close to shore that the propeller was digging up mud.*

Peter Lursted was a seaman on the "Samson." He was not on duty at the time of the collision; he was aroused by the trouble bell. He got on deck just at the time of the collision and was on the port side forward. When he came on deck the "Samson" with her barges seemed to be heading toward the Puget Island shore. He was one of the sailors who got into the boat and went over to the "Henderson." He didn't notice the range lights when he went over because he was pulling. This boat was the first boat to get to the "Henderson." He was on the "Samson" when she picked up the stone barges the next morning. He testifies in regard to picking up the barges. (Transcript, pp. 870 and following.) He testifies that they picked up the port barge first and it was about 200 feet from the shore and anchored. He testifies that the other barges were an-

chored; that they were picked up and were about the same distance from the Puget Island shore. He testifies, page 873, that all of the rock barges were near to the Washington shore when they were picked up. This witness testifies (Transcript, p. 875) that he had frequently steered the "Samson" and that their accustomed course when they get around Bugby Hole is to steer for Skamokawa light until they get the ranges in line; that in steering the "Samson" and her barges from Bugby Hole until they got to Skamokawa light they give her port helm.

Elmer Grunstad was pilot on the "Daniel Kern" on the evening of the collision and on duty on the "Daniel Kern" when she passed the "Henderson." He testifies, page 883, that they passed the "Henderson," as near as he could judge, down toward Cathlamet cut-off, a little above that slough,—what is called Cathlamet cut-off. This witness testifies (Transcript, p. 884) that he noticed the manner in which the "Henderson" and her tow was steering, that when he swung in on the ranges, her green light first disappeared and then showed in sight again, and that he got on the lower side of the ranges in order to get clear of her, and while he was getting off, the red light disappeared. The "Kern" passed the "Henderson" to starboard. This witness testifies that *he saw the lights of the "Samson" behind him all the way until he passed Bugby Hole and that the "Samson" was, in his judgment, between half a mile to one mile behind him, and that he noticed two white lights on the barges.* He testifies (Transcript, p. 893) that when you get to

Bugby Hole you carry a little port helm until you make the turn and until you get on the ranges, and on page 895 he testifies that he had not passed Cathlamet Slough when he met Sullivan. On page 897 he testifies that he passed Sullivan, he thinks, less than a quarter of a mile above Cathlamet Slough.

Thomas A. Parker testifies that at the time of the collision he was on the "Samson" on deck on the port side of the house. He testifies (Transcript, pp. 911 and following) that he saw the collision; that when he got on deck he saw the port rock barge strike the oil barge on the bluff of the bow and glance off and at the time the "Henderson's" lines parted and the port barge went down against the "Henderson." He testifies (Transcript, p. 912) that he saw *the oil barge* as soon as the collision took place, *go right along* and *that he heard one whistle from the "Samson" a few seconds before the collision which awakened him*; that he heard two backing bells from the "Samson," and as soon as he got dressed went for the life boat and went over to the "Henderson." On page 914 he testifies that the "Samson's" life boat was the first boat to reach the "Henderson," and that it was there at least a minute before any other boat arrived. On page 915 he testifies that after he had taken the men from the "Henderson" over to the "Samson" he went back and got a line on the "Henderson." On page 916 he testifies in regard to picking up the barges the next morning. He testifies that the lone barge was first picked up, that it was close down to the end of Puget Island and about 200 feet from the shore in shallow wa-

ter, and *that they stirred up mud when they got it.* He testifies that two barges were anchored together near the little slough approximately 200 feet from the Puget Island shore. (Transcript, p. 917.) On page 918 he testifies that he thinks the collision occurred out 500 feet from the Puget Island shore, pretty close to the place where the two barges were anchored, and on page 919 he testifies that the "Samson" and her barges at the time of the collision seemed to be pointed toward the lower end of Puget Island. On the same page he testifies that *he heard no orders given from the "Henderson" or the oil barge, and heard no anchors run out on the oil barge.* On page 920 he testifies to examining the rock barges; that he examined the rock barges at the time they got them from the "Hercules" and that the port barge at that time was in first-class condition. On page 921 he testifies that he examined the center barge, that he was informed the barge was leaking, and that he found her leaking pretty badly. On page 922 he testifies that when the barges were picked up there was a white light on the port side and a white light on the starboard side of each of the two outside barges. On pages 922-3 he testifies in regard to going alongside the oil barge in the morning and testifies that she was under the bluff, down below the bluff a little, *that her stern was swinging quite a ways down like as if she was going down Prairie Channel.* On page 923 he testifies that he noticed the Hunting Island Range lights when he went over to the "Henderson" in the life boat, and that when they got out the boat they were on the *upper side of the Puget Island*

ranges, and that when they got to the "Henderson" in the life boat she was above the ranges.

Fred Pederson was oiler and fireman upon the "Henderson" and was on duty at the time of the collision. He testifies (Transcript, pp. 1007 and following) that he was sitting in the doorway on the port side of the "Samson" and heard the "Henderson" whistle, and could not say whether it was the "Henderson" or the oil barge. He immediately went out on deck to see which boat was approaching, and as he stepped out he could not see, and walked up forward, and as he got over near the forward end of the house he saw two green lights and two objects. Pretty soon after they blew one long whistle to pass again and a few seconds after that the crash came. It looked to him that the "Henderson" and oil barge changed her course very rapidly and swung very rapidly to starboard and swung right into the ranges. He testifies that he heard the first signal from the "Henderson" answered by the "Samson," and that it was answered promptly; that he heard *the second signal* from the "Henderson" *answered by the "Samson,"* and that it was answered promptly. On page 1009 he testifies that he saw the port barge just graze the oil barge and strike the stem of the "Henderson" and the *middle barge mashed into the port side of the "Henderson";* that he *saw the oil barge after the crash, that she was broken loose and was going by the "Samson," seemingly rapidly;* that after the oil barge passed he watched the oil barge farther and *did not hear any anchors let go on the oil barge or any orders from the*

"Henderson" or the oil barge to let go the anchors. On page 1011 he testifies that after the collision he saw the "Henderson" until her lights went out; that at that time the "Samson" was anchoring her barges but that her engines were not working. He also testifies that he heard the stop and full speed astern bells on the "Samson," and that the same were given before the second whistle was blown. On page 1012 he testifies that he saw the one rock barge picked up, that it was on the Puget Island side about 150 feet from the shore. This witness also testifies to examining the rock barges the next morning, and he produced a sketch which he had made himself showing the way the boats looked to him, (Transcript, p. 1016) which sketch was offered in evidence marked "Claimant's Exhibit C." On page 1021 this witness testifies that he heard the order "hard aport" given from the oil barge, that he heard it repeated, and that this order was given just after the collision. On page 1029 he testifies that this order sounded to him like it came from the after part of the oil barge.

Xenophon Merjano was the barge man on barge No. 9 at the time of the collision. He was on the barge at the time of the collision and asleep. He testifies (Transcript, p. 1052) that *he put the light on barge No. 9 the night of the collision on the port side and that it was carried on the barge at the time the collision occurred.* That he got up and *found his scow away from the other scows and from the "Samson" too;* that he took a light from the cabin and went forward; when he got forward he saw the bow was

smashed up; that he ran back, put that light on the bits (that is what they call the post they make fast the line on) and took the other light which he had for his side light; that at that time the barge was not anchored; he was adrift; he was afraid that there might be some other steamer passing which would strike him again; that *he took the side light and went down below to see if the water was coming in* and found the hole about 16 inches above the water line; that he examined the scow along and was drifting down the river all the time; that when he found his scow was all right he came up and was still drifting; then he dumped his anchor overboard and remained on that barge the balance of the night and was there when the barge was picked up the next morning. On page 1055 he says that he was about 180 feet from the shore on the starboard side going down the stream. This witness had been a seaman for sixteen years, and he testifies that he put out that light on the port side of his barge as soon as it became dark, as soon as the "Samson" put out her lights. On page 1055 he testifies that prior to the collision this barge was all right; the next morning he also noticed, besides the fact that the barge was broken some, black paint along from the bow aft for 15 or 20 feet, and that this paint was not on this barge before that night.

Captain Joseph O. Church was master of the "Samson" on the night of the collision, and was on duty at the time they changed tows with the "Hercules." He testifies on page 1070 that he noticed the lights on the barges at the time he picked them up that night and took

them from the "Hercules"; that *there was a white light on the port barge on the port side and a white light on the starboard barge on the starboard side*; that he was on duty for sometime after the barges were taken from the "Hercules" and could see that these lights were still burning on these barges so long as he was on duty. He testifies that he does not remember hearing any whistles from the "Samson," but remembers hearing some short whistles from the "Henderson" just as he woke up. He testifies (Transcript, p. 1071) that he saw that the life boat was lowered; that he gave orders to let go the lines from the barges and anchor the barges. He also testifies that he went over to the "Henderson" on the "Samson," and that at that time the crew and passengers were on board the "Samson"; that they got a line over the "Henderson" on the cavel and tried to shove her toward the shore some, but the line let go and they got another one and laid against her bow and kept working ahead and shoving her toward shore, holding her against the current. This witness had been master of the "Henderson" at one time for about two years, and had towed with her, towing oil barges at times of the Union Oil Company, barges of practicaly the same kind as oil barge No. 93. He testifies, page 1083 and following, that he had had experience in breaking lines between his tow and his towing vessel and that, in his judgment, *the breaking of the lines between the oil barge and the "Henderson" would not check the momentum of the oil barge a great deal, nor retard her speed more than a quarter of a mile an hour*. He also testifies, page 1085, that backing for not more *than a minute full speed astern of the "Hen-*

dereson" would not reduce the speed of the oil barge more than one quarter; that, in his judgment, if the "Henderson" was cut loose from the oil barge after having backed for not more than one minute full speed astern in the condition of the current and tide at the place of the collision, the oil barge would go about a quarter of a mile against the current, but if she turned and drifted across the current, she would go a great deal farther. He testifies, page 1088, that *he did not hear any anchors let go on the oil barge at all, nor hear any noise from the anchors*. On pages 1091 and following he testifies in regard to the rock barges when they were picked up the next morning after the collision; that they were anchored at the time; *one was just below the lower point of Puget Island, pretty close to the sand bar, close enough in so that when the tug went in along side it kicked up mud there*; that the other two were some distance—probably a quarter of a mile—along the island, and were about 200 feet of the Island; *that all of the barges were on the Puget Island side of the range lights and something like 600 feet above the ranges*. On page 1092 he testifies that he does not think that the "Samson" worked her steam at all after the collision or did anything to direct the course of the barges after the collision. On page 1093 he testifies that he noticed the condition of the rock barges the morning after the collision; he found that the port barge had been struck at the round of the port bow and also there was a notch a little off to the starboard of the port barge cut about eight inches deep by some sharp object that looked like the stem of a boat; that the center barge had two planks

broken, the nosing turned up and some rocks has been knocked loose and tipped over; that he also noticed black paint on the port bow. On page 1095 he testifies that as soon as he started to tow the barges, *the center barge commenced to leak and so they had to bulkhead it.* On pages 1114 and following the witness testifies in regard to the manner in which he is accustomed to steer the "Samson" in coming from Coffee Island along Puget Island and testifies that he aims to keep about 400 feet or 500 feet off the Puget Island shore until they get below lower Skamokawa light and then run for lower Skamokawa opening until they strike the Hunting Island Range lights, and marked on the chart, Libellant's Exhibit 1, the point on the Hunting Island range where he usually strikes the range light. On page 1125 this witness testifies that if the stem of the "Henderson" had struck the bow of barge No. 9 and made a cut in it, the cut being between six inches and two feet in depth, it would not dent the stem of the "Henderson" much.

A. Sass was the master of the steamer "Hercules" on the night of the collision and transferred the barges from the "Hercules" to the "Samson." He testifies (Transcript p. 1129) that *he examined the barges* which he took down from Fishers Landing on July 21 and that *they were in good condition when he transferred them to the "Samson";* that there were no breaks or cuts in them nor anything broken about them. He testifies that he *saw that the lights were put on the barges that night,*—one was put about twenty feet from the bow on

the port side of the port barge and one about the same distance from the bow on the starboard side of the starboard barge, and that these lights were on the barges and in good condition at the time he delivered these barges to the "Samson." On page 1130 he testifies that when he got these barges back from the "Samson" No. 27 and No. 9 were damaged some.

J. P. Copeland was the master of the Steamer "Daniel Kern" the evening of the collision. He had been master of the "Hercules," the "Samson," the "Daniel Kern," the "Diamond O," which towed the oil barge from the place of collision to Portland. He testifies that in going around Puget Island he usually keeps nearer the Washington or Puget Island side and aims to get on the range lights about opposite the trap, which is about half way between the two sloughs. His attention is called on page 1135 to Claimant's Exhibit A, a chart upon which he marks the sloughs "1" and "2" and testifies that the trap is just a little above the mouth of No. 2, that the trap extends out about 600 feet and that when you pass the trap you are about 200 feet from the ranges. On page 1137 he testifies that the "Samson" tows faster than the "Kern," gaining about an hour and a half to an hour and three-quarters in fifty miles. On page 1138 he testifies that he passed the "Hercules" and soon after passed the "Samson"; heard the signals between the "Samson" and the "Hercules" when they exchanged tows and that on an average it takes about ten minutes to exchange tows. On page 1145 he testifies that he met the "Samson" with her tows the morning

of July 22nd just above Astoria and noticed that the port bow of the port barge had its nose turned back or broken and that there was some black paint on it, and that on the port bow of the middle barge there was a hole over which there was a piece of canvas.

John Peterson was not called as a witness, but on stipulation between the parties, his testimony taken before the inspectors was read into the record. Before the inspectors he testified, record pages 1198 to 1225. He testifies on page 1199 that he was on the "Samson" at the time of the collision of the "Henderson" and the "Samson" on July 22, 1911, and was at the wheel; that he came on watch at twelve o'clock, and that when he came on watch *Jordan was on duty and in the pilot house, and that he remained in the pilot house all the time until after the collision* and gave him his orders as to what to do. On page 1200 he testifies that he is acquainted with Hunting Island, knows where Coffee Island is, where Tenas Illihee is, where Bugby Hole is, where Bugby light is, where Westport Slough is, and where the Westport light is. On page 1201 he testifies that when they got to the bend the *pilot told him to port his helm a little and he did so*, and that then he saw the mast head lights of a steamer and the pilot said to him, "I wonder which side he wants to take," and I said, "I don't know," and then in a little while the steamer gave one whistle and the pilot answered and ordered the helm aport; that at that time the wheel was a little to the port but it was not hard aport; that he put he wheel over and the pilot said "Have you got it over?" I an-

swered "yes" and just about that time the bell went off; that after the first signal was given and answered the pilot said, "He steers kind of bad"; then the steamer turned around and showed us a green light and that green light didn't shut out except for a minute, and the pilot said, "That looks kind of funny," and then that steamer blew another whistle and the pilot said, "Wheel over?" and I said, "Sure, the wheel is over," and then that green light again and that green light was not shut out before the accident, probably a few minutes, before he was on top of us; the green light was shut out when he was almost on top of us. On page 1203 he testifies that he *came around the Island close up to the Island*; that he did not see the "Kern" at that time but saw the boat which was coming; he saw this boat for probably a couple of minutes or three minutes before she whistled and after she whistled he put the wheel hard over. Before that time it was a little bit over but not hard over; that the pilot answered the whistle with one whistle; that probably within three minutes more or less she blew a second whistle. On page 1205 he testifies that when he first saw the barge he did not see anything more than the mast head lights and when he did see the side lights he saw the two—both red and green—and he saw both lights after he blew the first whistle and continued to see both lights until after the second whistle was blown and continued to see both lights until just before the collision when she shut out the green light, probably a few seconds before the collision. On page 1207 he testifies that in coming around the Island that night they were close into the Island and came around on a little port

helm and kept a little port helm all the time. On page 1208 he testifies that *he remembers that the second signal was also answered*; that he knows where the ranges are down there, the Hunting Island range, *and that they were above the ranges all the time*. After the accident he testifies, page 1210, that the pilot took charge of the wheel and that he did not notice after he left the wheel, as he went down below, first to let go the lines on the barges and then to lower the boats. On page 1212 he testifies that he remembers the "Samson" backed about the time of the accident; that he backed a minute or two minutes, he does not know how long, and was still backing when he went down below. On page 1214 this witness testifies that he was looking at the "Henderson" when she came right into them in the collision; *that the center barge struck the "Henderson" amidships*; that he could not say whether the port barge struck the "Henderson" or not, or whether the port barge struck the oil barge or not; that after the accident the oil barge went by them slowly. On page 1215 he testifies that he *did not hear any orders to drop the anchors*, but heard the order given by the captain of the "Samson" to drop the anchors on the rock barges. On page 1216 he testifies that in turning the Island they kept pretty close to the Puget Island shore, but cannot tell what distance he was from the shore, as he did not take much notice of the shore. On page 1217 he testifies that one of the barges, when picked up in the morning, was about a couple of hundred feet from the shore and a couple of them were a little more than that. On page 1218 he testifies that, so far as he could judge, the oil barge did not change

her course at all, because he saw the two lights right along almost. On page 1225 he testifies that the "Henderson" looked to him as though she came from the land.

TESTIMONY OF THE OFFICERS AND CREW OF THE OIL BARGE AND "HENDERSON."

From the testimony of the several witnesses who were on the oil barge and "Henderson" on the night of the collision, it appears:

(1) That no sufficient lookout was kept either on the oil barge or the "Henderson." The boatswain, Martinson, on the oil barge, who was the lookout at the time, testifies, page 112, that he was keeping lookout and assisting the pilot. On page 119 he testifies that "Well, I had some kind of a lookout, but I had no responsibility in the lookout part, you know." Phil Crossen was the watchman on the "Henderson." His testimony is found on pages 1226 to 1247. He was in the galley when he heard the danger signals blown. He did not see the "Samson" until after the danger signal was given. (p. 1227-28.) Neither of these lookouts saw the white light on the port barge of the "Samson's" tow. Neither of them paid any attention to the lights. Crossen testifies (p. 1238) that he paid no attention to the Samson's lights; that the barge which struck the "Henderson" at the corner of the house had no light on it, but that there was a light on the barge beyond that. It is evident that the barge which he saw strike the house was the center barge and that he did not see the port barge

at all. Neither of these witnesses heard the second signal given on the "Henderson" answered by the "Samson," but the helmsman on the oil barge heard the answer.

(2) The cross-examination of Sullivan, pilot who had charge of the navigation of the oil barge and the "Henderson," clearly shows that he did not know where he was and that when he saw there was danger of a collision, he lost his head. He admits that in testifying before the inspectors when the whole situation was fresh in his mind, he placed his boat in the river farther from the point of collision than the point at which he placed the "Samson." He could not place the "Samson" farther up the river, for if he had it would have been behind the point of Puget Island and would not have been in sight. He, therefore, had to change his own location in the stream by bringing himself farther up the stream. The testimony shows that the red and green lights of the "Samson" were situated about sixteen feet apart and fitted in board screens. The only testimony as to the near point at which both lights could be seen simultaneously is that of Captain Church. (Transcript p. 1112). He testifies that *both lights could not have been seen from any point dead ahead of the "Samson" less than 400 distant from her stem.* The testimony shows that Captain Sullivan was familiar with the "Samson"; had been her master for year, and doubtless was familiar with those facts as testified to by Captain Church. At all events no attempt was made to contradict this testimony. The testimony of the witnesses, Sullivan, Martinson, Stayton and Kalberg, taken together is to the effect that

the "Henderson" and oil barge passed the "Daniel Kern" opposite the sand bar a little below the lower point of Puget Island; that soon after this the lights of some vessel came around the upper bend of Bugby Hole, which lights were recognized by Sullivan instantly to be those of the "Samson" and her tow. That thereupon an order was given to port the helm of the oil barge a little, swinging the "Henderson" and her tow from the upper side of the Hunting Island Range lights where they had been at the time of passing the "Kern" to the starboard side of these range lights until they were well below the ranges; that the helm of the oil barge was then steadied so that the vessel proceeded on a course about parallel with the range lights until the "Samson" was about half a mile away; that at this point the oil barge blew one whistle, which was answered by the "Samson"; that both the red and green lights on the "Samson" had been visible to Sullivan and to Stayton on the "Henderson" from the time that they first saw her come around the bend of Puget Island and remained so visible until just before the collision; that after the first signal the oil barge continued on the same course without changing her helm and the "Samson" apparently came straight on down the river without changing her course; that thereupon Sullivan said, "That man don't seem to alter his course; give him another whistle"; that thereupon another whistle was blown by the oil barge; that Sullivan and Stayton don't remember having heard any answer from the "Samson"; nor does Martinson or Crossen remember hearing this signal answered; that at the time of this signal, the "Samson"

was about 500 feet away; that then, Sullivan, fearing a collision, ordered the helm of the oil barge hard aport and then called up Stayton, the pilot on the "Henderson," to stop, port and back, and that within a minute later the collision occurred. This testimony cannot be correct, for if the "Samson" proceeded from where she is placed by Sullivan when he first saw her to the point of collision as located by Sullivan, without changing her course in this distance, her course was at such an angle that only the green light of the "Samson" would have been visible to those on the oil barge and "Henderson." However, this testimony is to the effect that during this time the course of the oil barge and "Henderson" was parallel with the range lights. Furthermore, had this course been pursued by the oil barge and "Henderson," the "Samson" must have passed entirely to the starboard and no collision could have occurred. It was not necessary for there to be a change in the colored lights on the "Samson" to enable those on the oil barge to tell whether any change was made in her course. The distance between the bright light on the starboard bow of the starboard barge of the "Samson's" tow and the masthead lights was at least 150 feet, and any one watching these lights with any care could have told whether any change was made in the course of the vessel upon which these lights were carried. These lights, indeed, may be said to have constituted a range line in themselves and would have clearly indicated the course pursued by the vessel, and especially any changes made in her course. It will readily be seen that in order to collide with the "Hender-

son" at the point indicated by the testimony for the libellant, the "Samson" must have steered directly for the high bluff above Bugby Hole.

(3) If the collision occurred, as claimed by the witnesses for the libellant, and the oil barge was anchored within less than 200 feet of the place of the collision and if a lifeboat were launched as soon as the oil barge came to anchor and such lifeboat put off at once toward the "Henderson," it is plain that the lifeboat must have been launched within a very short time after the collision occurred, and that when the lifeboat was 400 feet from the oil barge at anchor. The lifeboat, therefore, from the oil barge would have reached the "Henderson" long before a boat could have reached the "Henderson" from the tow head, for from the tow head the boat would have had to go up stream a distance of more than 2500 feet. The testimony shows that when the lifeboat from the oil barge reached the "Henderson" all the passengers had been rescued and the boats of the firshermen were on the ground. It is plain, therefore, that the oil barge must have drifted a considerable distance before it came to anchor, or the testimony of the witnesses in regard to the launching of the lifeboat for the relief of the passengers of the "Henderson" must be untrue.

(4) The testimony on behalf of the libellant shows that the "Henderson's" lights did not go out for several minutes after the collision. Sullivan testifies, page 145, that the "Henderson" drifted in the direction in which the channel runs but only lasted a few minutes until the lights went out and then he could not see her any more.

(5) It appears, therefore, that either the oil barge drifted for two to five minutes after the collision or that the lights of the "Henderson" went out before the oil barge came to anchor.

(6) The navigation of the oil barge and "Henderson" by Captain Sullivan, assuming the facts to have been as he and the witnesses on behalf of the libellant testified, was in direct violation of the rules of navigation. The rules of navigation provide that "if, when steam vessels are approaching each other, either vessel fails to understand the intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short rapid blasts, not less than four, of the steam whistle." The rules further provide that when the danger signal is given the vessel must stop and back. In other words, that everything must be done by each vessel to avoid a collision. It is not denied that Captain Sullivan said, "That man don't seem to alter his course; give him another whistle." It is claimed on the part of these witnesses for the libellant that they could observe no change in the course of the "Samson," but that she seemingly maintained the same course at all times. It is admitted by all parties that the signal had been given by the oil barge to pass to port and that this signal had been answered. When these signals were exchanged it was the duty of each vessel to so change its course as to pass safely to port. It is not claimed that the oil barge changed her course after this signal until after the second signal was given. It is not claimed on behalf of the libellant that the "Samson" changed her course at all. The two vessels, there-

fore, must have been approaching each other at an angle or they could not have collided; or, if they were not approaching at an angle, then neither of them changed its course and they were approaching head-on. In either case it is evident that no intelligent pilot could have understood the course of the "Samson" and her tow, for it was the duty of the "Samson" to have changed its course, and if it did not change its course, then it is evident that its course or intention was not understood by those on the vessel approaching. Therefore, when the oil barge gave the second signal, it is clear, according to the evidence on the part of the libellant, that the "Samson's" course was not understood by those in charge of the oil barge and "Henderson," and the giving of the second signal was, therefore, a violation of the rules of navigation. Particularly would this be true, when, as testified by these same witnesses, they claim that they were running so near the Oregon shore that there was imminent danger of running aground upon that shore. To illustrate this point, your Honor's attention is called to Diagram No. 1 drawn to a scale, libellant's Exhibits 1 and 2, and claimant's exhibits A and B.

TESTIMONY OF THE FISHERMEN.

The testimony of the fishermen who were called as witnesses in this case sustains, in part, the contention of the libellant and contradicts, in part, the testimony of the officers and crew of the oil barge and "Henderson," and these witnesses contradict one another.

Charles Johnson, the first of these fishermen, who was passed by the "Henderson," says that the "Daniel Kern" passed 25 or 30 minutes ahead of the "Henderson"; if so, she could not have met the "Henderson" at or near the sand bar, for she passed Johnson while he was on the tow head and he did not begin to lay out his net until after she passed. He testifies that it would take five minutes for him to get from the tow head to the place where he laid out his net and seven minutes to lay out his net and twenty minutes to drift to the point where he was at the time that the oil barge and "Henderson" passed him which was about at the sand bar just below the lower point of Puget Island. It is clear that Johnson was merely guessing at the time, for more than forty minutes had elapsed between the time that the "Kern" passed him on the tow head, as he testifies, and the time that he reached the place where he passed the "Henderson." It is significant that this witness did not hear any of the passing signals exchanged between the oil barge and the "Samson." He apparently paid no attention to the collision at all, though he says he heard the trouble whistle. Eddie Grove, whose fishing turn came next to that of Johnson, and who, with Loaland, was fishing, claims that he was passed by the "Henderson" to the starboard just below the tow head and that when the collision took place he had reached the sand bar. (Transcript p. 292). He says he heard the passing signals, but states that he did not hear the second signal given by the oil barge answered. He testifies that as soon as the oil barge passed him he saw the "Samson." He does not define

with accuracy the time at which these passing signals were given. The testimony of this witness is most improbable. He claims to have been watching the "Henderson" and oil barge because it seemed to be going close to the Oregon shore; that he heard the passing signals, the crash and the anchor chains going out at once, or practically at once, yet he had passed the "Henderson" and oil barge and there was no reason for him to watch this craft, for he was in no danger of being run into by it. He might expect a steamer coming up the river to endanger his net or his boat or both, and it was his duty to keep a lookout for boats coming up the river, as he claims that he, in his boat, was on the ranges at that time; in other words, in the center of the channel. The fact that he claims that he was watching the oil barge and "Henderson" is unnatural and the fact that he could not tell what lights the "Henderson" and oil barge showed or what lights the "Samson" showed and did not watch the "Samson" and her tow, which he must have known would come down the channel before he could get back to the tow head is again unnatural, and it is incredible that he should have been watching the oil barge and "Henderson" instead of the "Samson" and her tow. He claims that when he left the "Henderson" he laid out his net for another drift and found two rock barges anchored on the Oregon side of the range lights and in his way; that he passed near to them and yet he could not swear that he saw any light upon either of these barges. He also claims that he passed near the third barge anchored down near the sand bar, but was unable to say whether that barge carried any light. He

claims that when the collision occurred he was three-quarters of a mile away (the chart shows that he was even farther) and yet he claims that at that time he saw the spars and mast of the oil barge, and yet the witnesses on behalf of the libellant, who were on the oil barge and "Henderson," claim that the night was so dark that they could *not see the shore on either side*, and therefore could not locate themselves accurately in the stream. One witness, Stayton, testifies that it *was so dark*, that he, *in the pilot house of the "Henderson," could not see Sullivan on the bow of the oil barge, not more than 190 feet away from him.* (Transcript pp. 505-6). Loaland was in the same boat with Eddie Grove. His testimony does not differ from that of Eddie Grove, except in small details of time and place. Ole Grove and Dahl were in the same boat. They do not claim to have noticed the "Henderson's" course. They contradict the testimony of the officers and crew of the oil barge and "Henderson" in this that they testify *that the first signal was given just as the "Henderson" passed the tow head.* They differ between themselves in that Ole Grove testifies that they took three passengers from the "Henderson," whereas Dahl testifies that they did not take any passengers from the "Henderson." *Ole Grove testifies that he saw the green lights on the "Samson" at the time the first passing signal was given and saw no other colored light; indeed, that he never saw the "Samson's" red light at all.* Dahl, on the other hand, testifies that *he saw the "Samson" from the tow head* and that at the time he first saw the "Samson," the "Hen-

derson" was about abreast from the lower end of Puget Island and that *he never saw any colored light on the "Samson" except the red light.* (Transcript pp. 366-7). He repeats again, on page 383, that he saw *the red light of the "Samson" and not the green light* and that he was with Ole Grove at this time. These two witnesses, Ole Grove and Dahl were over to the "Henderson" and aided in taking off the passengers. They claim that they saw the rock barges in their way and therefore did not lay out their nets again that night, but they went home and had breakfast and came out again. Charles Johnson also claims that he saw these stone barges anchored on the Oregon side of the ranges the next morning, and yet he admits that he did not come out until seven o'clock. The log of the "Samson" introduced in evidence by the libellant (transcript p. 943) shows that the "Samson" began picking up the rock tow at 4:20, that the tow was made up and under way at 5:40. This record was kept moreover by the witness Jensen who went off duty at six o'clock and at that hour was succeeded by Goodell. It is manifest from an examination of the evidence of these witnesses that the fishermen really knew nothing about the collision at all. There was no reason for any of them to watch the oil barge and "Henderson," and every reason why they should watch the "Samson" and her tow. The oil barge and "Henderson" were not in their way; the "Samson" and her tow, they claim, were in their way. None of these witnesses was within half a mile of the place where the collision took place, and it would have been impossible for any of them to have seen anything that oc-

curred. They themselves testify that when they first saw the "Henderson" she had drifted off and above the point of Tenas Illihee Island. They had all talked with Captain Shaver, the principal officer of the libellant. They are all apparently ignorant men and paid little attention to what occurred around them. They were evidently intent upon their own pursuits. It is probable that they heard the whistles, it is also probable that they went to the "Henderson," but none of them went to the "Henderson" until he had finished his drift. It is improbable that they paid any attention to the "Samson" and her tow. Before passing from the testimony of these witnesses, the fishermen, some comment should probably be made upon their testimony regarding the currents. On the part of the libellant it is claimed that there is no current setting toward Prairie or Clifton Channel, but that the current sets from Bugby Hole down the main ship channel toward the lower end of Puget Island. It is true that the witness Sullivan admits there is some current down Prairie Channel (transcript p. 204) and Moran admits (transcript p. 1179) that there is some current from the old mill point down Prairie Channel. Shaver also admits (transcript p. 133) that some current goes down Prairie Channel, but all of these witnesses testify that most of the current goes down the ship channel. Ole Grove (transcript p. 427), Eddie Grove (transcript p. 323), Loaland, (transcript p. 339), and Johnson (transcript p. 390), all testify that the current sets down the ship channel toward the lower end of Puget Island. On the other hand, Church (transcript p. 1095), Jordan (transcript p. 609), Cope-

land (transcript p. 1134) and Grunstad (transcript p. 888), who have been masters of long experience on steam boats on the waters of the Columbia River, testify that the *current tends toward the point of Tenas Illihee Island and that there is a strong suction toward Prairie Channel*. Their testimony is corroborated by the testimony of other witnesses for the claimant. The fishermen base their testimony upon the fact that their nets, which are 45 feet deep, are put out less than 900 feet from the center of the channel and drift from that point down the ship channel. These nets are all weighted and they are put out from the Oregon side at a distance commencing probably 1000 feet from the Oregon shore. The other end of the net is carried toward the range line and when the cast reaches the range line the Oregon end of the net is about parallel with the end carried by the boat. These are the only facts upon which these witnesses testify regarding the trend of the current. As the water going into Prairie Channel is less than 20 feet deep, it is evident that there would be no tendency for the net weighted at the bottom to go into a channel less than 20 feet deep when the bottom of the net was 45 feet beneath the surface. Certain circumstances, however, clearly indicate that the testimony of the masters is correct. These circumstances are so convincing that your Honor's attention will be called to few of these circumstances:

(1) It is admitted that the oil barge anchored between 200 and 300 feet from the Oregon shore, and that, when anchored, she *tailed down Prairie Channel*. Many witnesses testify to this fact and no witness contradicts

it. Now, of course, the anchors being on the bow the trend of the vessel is down with the current and yet this barge was anchored from 200 to 300 feet from the Oregon shore in water 40 feet or more in depth.

(2) It is admitted by the fishermen and by all of them that along the upper part of Puget Island from the point where Grove Slough comes into the river to the point just above the next slough, the water is shallow. Here is also the Ostervolt seining ground. If the current were on that side of the river the water would not be shallow there, but would be deep if the reasoning of the witnesses for the libellant be applied, for they claim that the reason the current sets down the channel is because the water is deepest there.

(3) It is admitted by the fishermen and by all of them that toward the lower end of Puget Island there are snags which interfere with net fishing. Such snags are not found on the Tenas Illihee side. It is well known that snags are not found in a strong current but are found in the eddies and in shallow water.

(4) It is admitted by all of the witnesses that just below the lower end of Puget Island a sand bar has formed of later years and that this sand bar would not form in the stronger current, but the sand would be deposited where the current was less swift.

(5) The course of the river is a conclusive answer to this contention. The channel of the river comes along close to Puget Island between the upper point and the point where the island turns opposite Bugby Hole. The ship channel indeed runs between

Coffee Island and Puget Island and the deep channel runs into Bugby Hole and strikes against the Oregon shore where there is a high bluff, estimated by some of the witnesses at 1000 feet in height. This bluff is a rounding bluff toward the river and the water naturally striking the rounding bluff would round off from the bluff. From the bluff, therefore, it would flow directly toward the upper point of Tenas Illihee Island.

THE DRIFTING OF THE VESSELS AND THEIR LOCATIONS.

The witnesses for the libellant, Eddie Grove, page 293; Loaland, page, 337; Ole Grove, page 426; Dahl, page, 376, and Johnson, page 410, locate the two rock barges Nos. 27 and 8 as near the range line and on the Oregon side just below the tow head; the other rock barge they locate as on the Washington side of the range line and about abreast of Cathlamet Slough. Eddie Grove, page 295; Loaland, page 339; Ole Grove, page 474; Johnson, page 412. Ole Grove did not see the barges by day light as they were gone when he came out in the morning; Johnson could not have seen them by day light as the barges, according to the log introduced in evidence by the libellant, were under way at 5:40; Dahl does not claim to have seen them in the morning, as he was with Ole Grove; Eddie Grove and Loaland saw them from the tow head in the morning, so that the barges nearest to them were at that time about 900 feet distant, and it would have been impossible for them to say on which side of the range line the barges were, looking across the range line at the barges.

The witnesses for the claimant, on the other hand, who locate the barges when they were picked up the next morning, are Jordan, Jensen, Goodell, Parker, Pederson, Peterson, Merjano and Church. They all locate the one barge as between 150 and 300 feet from the Washington shore off the upper end of the sand bar, and several of the witnesses testify that it was so near the shore that in *taking this barge away the "Samson" kicked up the mud in the bottom of the river.* The other two barges they locate as between 200 and 500 feet from the Washington shore at a point varying between the little slough above the tow head and the point just below the tow head. Sullivan himself testifies that as he looked at the rock barges from the oil barge he placed them on the Washington side of the range line. Suffice it to say that the witnesses for the libellant who testify in regard to the location of the rock barges seemingly overlooked the lights of these barges, for *none of them say that they saw any lights on them* even when they were anchored. Furthermore, the witnesses for the libellant testify that when they went from the tow head to the "Henderson" they went below the two rock barges and that they were going up stream, so that their testimony shows pretty conclusively that the rock barges did not drift as far down the river as the tow head. The evidence on behalf of the claimant in regard to the location where the rock barges were picked up is overwhelming, and especially so as the testimony of these witnesses relates to the picking up of the rock barges at the time when it was daylight, so that the location of the barges could be better ascertained. It may be conceded in regard

to the drifting of the rock barges that the two rock barges, Nos. 27 and 8, were attached to the "Samson" until they were anchored; that the drifting of these two rock barges may have been affected in some degree by the "Samson" itself, though the evidence shows that the "Samson" was not working any steam. The location therefore of these two barges is not conclusive as to the place of collision, but the location where the other barge, No. 9, when at anchor is conclusive, for the evidence shows that she was cut loose absolutely from the "Samson" and drifted down stream without any motive power and without any steering gear.

Turning now to the "Henderson," the witnesses for the libellant above mentioned when the first went to the "Henderson" place the "Henderson" as drifting above the point of Tenas Illihee Island. The evidence shows that she was cut loose absolutely from the oil barge and drifted behind the oil barge as the oil barge passed her. The evidence shows that the "Samson" pulled and pushed the "Henderson" for a period of more than an hour. Witnesses for the libellant claim that she was pulling the "Henderson" into the channel, which, of course, is absurd; whereas, the witnesses for the "Samson" claim that she was holding the "Henderson" so as to have her finally rest upon the sands off Tenas Illihee Island. Only one witness estimates how much this action of the "Samson" upon the "Henderson" amounted to. He says, that in his judgment, the "Henderson" was pushed and pulled toward the Tenas Illihee Island by the "Samson" fully 600 or 700 feet. The evidence shows that the oil barge was cut loose entirely from the

"Henderson," had no motive power of its own and when cut loose drifted with a hard aport helm and came to anchor about 300 feet from the Oregon shore. The witnesses for the claimant who examined her when they took the passengers over to her the next morning testify that she was anchored from the forward part of the vessel and was tailing down the Oregon shore toward Prairie Channel. There is no evidence which contradicts this statement in regard to her location and the direction in which she was tailing. If, therefore, the collision occurred where the libellant claims, and the oil barge did not drift more than 300 feet before she came to anchor, it is evident that the current at the point where she came to anchor was setting down toward Prairie Channel and that the "Henderson" would have drifted in a somewhat similar direction had it not been for the fact that the "Samson" had lines on her. Again, if the collision occurred as claimed by the libellant, it is evident that barge No. 9 would have drifted practically in the same direction in which the "Henderson" drifted and she would have brought up also on the shoals of Tenas Illice Island.

Returning to the drifting of the oil barge, witnesses for the claimant, Jordan, pages 611 to 617; Grunstad, page 905; Church, pages 1082 to 1085; Copeland, pages 1146 to 1151, all of them masters of vessels on the Columbia River and familiar with towing, and some of them having handled the "Henderson" and being familiar with her backing capacity and all of them familiar with the oil barge and vessels of like craft and tonnage, testify that under the circumstances disclosed by the

evidence; that is to say, the oil barge going at the rate of three to four miles an hour and lashed to the "Henderson" as shown by the evidence; the "Henderson" backing for not more than one minute before the collision; the oil barge suddenly cut loose from the "Henderson" by the collision; the current and tide as at the place of collision; testify that the oil barge would have drifted toward the Oregon shore for a distance of from one-quarter to one-half a mile. All of the witnesses were examined in regard to the effect of the anchors, if the anchors were let go on the oil barge just after the collision, and they all testify that in their judgment the oil barge would have drifted at least 1000 feet, and some of them as much as a quarter of a mile.

Crowe, an old seaman, familiar with sailing vessels and the momentum of such vessels and also familiar with the anchorage and current at the place and time of the collision, having put before him the manner in which the "Henderson" and oil barge were moving, the manner in which they were lashed together and the fact that the "Henderson" backed for not more than a minute before the collision, testifies that, in his judgment, the oil barge would have drifted a quarter of a mile and practically toward the point where she was found at anchor. He testifies that, assuming the anchors were dropped as claimed by libellant and that they were of the weight claimed by the libellant, the oil barge would have drifted at least her length and a half, so that she would have drifted at least 500 feet.

THE TESTIMONY FOR LIBELLANT IS CONFLICTING.

This conflict is not so much the usual one of statement and contradiction; in fact, the story told by the libellant's witnesses is fairly consistent in outline. Captain Sullivan, indeed, has testified that he, whose business it was to listen for an answer to his second whistle, does not remember having heard such an answer (Transcript of Evidence, Page 38), and Kalberg, the quartermaster at the wheel of the oil barge under Captain Sullivan, has testified positively that he does remember that the "Samson" answered the second whistle from the oil barge. Captain Sullivan also varies considerably in his testimony with regard to the respective positions of the oil barge and the "Samson" (Transcript of Evidence, Diagram No. 2); in fact he admits that his change in his location of the oil barge and the "Henderson" at the time when he first sighted the "Samson" (from A' to A on Diagram No. 2) was caused by his discovering, after making the A' location, that the oil barge and the "Henderson," traveling at the speed they were making at the time, could never have reached the point where he testified the collision occurred in time to intercept the faster-traveling "Samson." In other words, Captain Sullivan's testimony displays a peculiar flexibility with regard to his various positions on the chart. Captain Sullivan also gives his opinion that, "There were not more than thirty seconds, or, at the outside, forty seconds, between the time of the crash, the two boats colliding, and these anchors were on the bottom"; yet he con-

firms as correct his testimony given at the previous trial of Captain Jordan, as follows:

“Q. How long after the collision before your barge came to anchor so that it was safe, and you could look around? A. Oh, I think it was perhaps in the neighborhood of five minutes. I should deem it was.” Libellant’s witness, Martinson, in his deposition before the United States Commission for the District of Oregon, testifies that Captain Sullivan gave orders to the man at the wheel of the oil barge to port his helm only once, when the first whistle was blown from the oil barge, but in his testimony before the court the same witness testifies that another order to port the helm was given after the second whistle.

It may perhaps be objected that the above are unessential inconsistencies; but a better estimate of the truth of libellant’s version can be gained, as is often the case, from an indirect, rather than a direct, treatment of the testimony. For instance, in telling the story of the accident, Captain Sullivan testified as follows: “The ‘Samson’ came on past the bow and I saw that the barge would clear, but she was going to catch the ‘Henderson’ with her tow.” Obviously, if the “Samson” were bearing down upon the “Henderson” and the oil barge very nearly at right angles, while the oil barge was swinging off the starboard, headed into the Oregon shore, according to libellant’s version, there would be no question of the oil barge’s “clearing” the “Samson” and her tow—unless, of course, Captain Sullivan might have meant that he saw that the oil barge would succeed in getting across the bow of the “spiked tow” before being hit. Consider-

ing, however, that the "Henderson" was struck at a point about thirty-five feet aft of her stern, which, as about one hundred feet of the "Henderson's" length lay along side the oil barge, would be about sixty-five feet forward of the stern of the oil barge, this interpretation of Captain Sullivan's words can hardly be accepted. The oil barge did not "clear"; consequently Captain Sullivan could not have seen that she was going to "clear." In fact the only possible interpretation of this testimony is that the vessels were actually approaching almost head-on, as alleged by claimant. In that case, and in that case alone, would Captain Sullivan have seen "That the barge would clear, but she (the 'Samson') was going to catch the 'Henderson' with her tow."

A glance at Diagram No. 2, or at Libellant's Exhibit 1, from which the diagram was traced, shows that the oil barge and the "Samson" were running on courses at a considerable angle to each other, which angle, according to testimony for libellant, was considerably increased just before the collision by putting the helm of the oil barge hard aport. Yet Captain Sullivan, on cross examination, has testified as follows:

Q. You were running at angles, weren't you?

A. Yes, but we were running also at a point where she was intercepting our course.

Q. I say, you were running at an angle with her, weren't you?

A. Yes, that is what I claim.

Q. I want to know how you could see her red lights when you were running at an angle with her, and she was running with her starboard side towards you?

A. I claim she was running directly towards me or there couldn't have been a collision.

Q. Could she have run directly towards you if she had run from the point where you placed her when the second signal was given to the point of collision?

A. I think so.

Q. And you put your helm hard aport, too?

A. She was going all the time, and we, of course, didn't get much out of her way. We didn't move out of the track far enough that she didn't hit us, so we couldn't have been running at angle away from her."

If this testimony means anything, it means that the vessels met in practically a head-on collision. The confusion and contradiction in Captain Sullivan's testimony result from his trying to support his story of the accident by means of observations made under circumstances quite inconsistent with such a story.

Again, libellant's witness Martinson, the boatswain of the oil barge, who was standing on the forecastle head behind Captain Sullivan just prior to the collision, has testified that at the time he left the forecastle head and went down to the main deck, after Captain Sullivan had given the order to the "Henderson" to port and back, *none of the scows of the "Samson's" tow had passed him.* As in the case of Captain Sullivan's examination, *supra*, this testimony is meaningless if the "Samson" and her tow were, as claimed by libellant, coming at almost right angles to the rapidly veering course of the oil barge. When Martinson went down to the main deck the "Henderson" was blowing danger signals; this was a second

or so before the collision occurred; therefore, there cannot have been any material change in the respective positions of the "Samson" and the "Henderson" between the time when Martinson left the forecastle head and the time of the collision. It is obvious that if the "Samson" and her scows were bearing down upon the "Henderson" and the oil barge in such a manner as within a few seconds to strike the "Henderson," at practically right angles, at a point about sixty-five feet from the stern of the oil barge there could be no question as to whether or not the "Samson" and her tow had "passed" the witness, who was standing with Captain Sullivan about twenty-five feet from the bow of the oil barge. On the contrary, if such had been the respective positions of the "Samson" and the "Henderson," the "Samson" and her tow must have been considerably astern of where Martinson and Captain Sullivan were standing; for the "Henderson" was hit about thirty-five feet from her stem, which would be about sixty-five feet forward of the stern of the oil barge, as above stated, and this again, the length of the oil barge being two hundred and eighty feet, would be about one hundred and ninety feet aft of where Martinson and Captain Sullivan were standing. Consequently this testimony of Martinson's, like Captain Sullivan's, plainly shows that the real conditions at the time he made his observations were quite other than those libellant has attempted to establish. The scows and the "Samson" were evidently coming almost head-on and were about to sweep past the side of the oil barge and strike the "Henderson;" but at the time Martinson left the forecastle head, thinking there

would be a collision, they had not yet "passed" the place where he was standing on the forecastle head. As the testimony shows that the oil barge was going about four miles an hour and the "Samson" about seven, it is easily seen that the combined speeds would make the traversing of the two hundred odd feet from the bow of the oil barge to the point of collision on the "Henderson" a matter of only a few seconds. This is in exact agreement with the rest of Martinson's testimony; and in fact only libellant's version of the accident can harmonize his testimony and make it intelligible.

Libellant's witness, Phil Crossen, in his testimony taken before the inspectors at the trial of Captain Jordan, stipulated to be copied into the record of this case, testifies positively that he saw the port scow strike the "Henderson," and that it did not strike the oil barge. This, as Crossen was standing right at the bow of the "Henderson" at the time of the collision, would at first sight seem to be very strong evidence in support of libellant's contention; but on further examination it, like the evidence of Captain Sullivan and of Martinson, becomes instead a refutation of such contention, and this is shown by the strongest kind of "internal evidence." Crossen, it seems, was standing behind and to port of a tank on the foreward deck of the "Henderson." This tank was from four to four and a half feet high and from twelve to fifteen feet from the "Henderson's" stem. Crossen saw only two scows. The scow which hit the "Henderson" was, so far as can be made out from the witnesses' confused answers, the one which seemed to him to be the furthest in front; and it had no light on

it, whereas the scow next to it—the one furthest away from the witness—had. Both Captain Jordan and claimant's witness Merjano, the man in charge of the port scow, number 9, testified positively that that scow carried a white light on her port bow. In view of this latter testimony Crossen's account of the collision seems impossible to explain. If it were the port scow which hit the "Henderson" Crossen should have seen the light that scow carried; and it is inconceivable how the bow of the port scow, which the testimony shows was fifty feet aft of the bow of the center scow, could have appeared to him to be the furthest in front. If, however, claimant's version of the collision be accepted, Crossen's testimony becomes at once reasonable and convincing. He saw no light on the scow which hit the "Henderson" because there was none; and he saw a light on the scow furthest from him because that scow, being the starboard member of the "Samson's" tow, carried a light on her bow. He saw no light on the scow which hit the "Henderson" because it appeared to be the furthest in front because it was so; and Crossen did not see the port scow because he was behind the tank and was engaged in watching the other scows. Crossen also testifies that he thought the scows were going to pass, an opinion he could hardly have formed had they been coming at practically right angles; and the fact he saw only two scows is strong corroboration of claimant's contention that the port scow being hidden from him by the tank, there were only two scows for him to see. The confusion and many contradictions in the testimony of this particular witness are, as in the instances of Captain Sullivan and of Martinson, easily

accounted for by the fact that he, like Captain Sullivan and Martinson, was trying both to record his actual observations and to explain them according to libellant's theory of the collision.

THE UNDISPUTED EVIDENCE CLEARLY SHOWS THAT CLAIMANT'S VERSION IS THE ONLY POSSIBLE ONE.

It is undisputed that after the collision the port bow of the port scow was slightly injured, that there was a cut in her starboard bow, and that the bow of the center scow was broken in and her forward deck scarred (Transcript of Evidence, pp. 811 and 1145 and 902); that there was black paint all along the port side and on the towing post of the port scow (set 15 or 20 feet from the stern), which had not been there before (Transcript of Evidence, pp. 768-769, 786, 1056 and 1145); and there is also some testimony that there was yellow paint on the scow as well (Transcript of Evidence, pp. 769-770), and that some paint was rubbed off the oil barge, on her port quarter, for about fifteen feet, at a point from fifty to sixty feet from her stern (Transcript of Evidence, pp. 555-556). There is indeed contradictory evidence regarding the yellow paint, and the witness Kness who testified to the scratch on the port quarter of the oil barge has also testified that the guard of the "Henderson" would have rubbed the oil barge at that place; but it certainly appears, both from the testimony and from the photographs of the wrecked "Henderson," which libellant has introduced in evidence, that this black paint could not have come from the "Henderson." No

explanation for its presence can be given under libellant's version of the accident. If the port scow struck the "Henderson" about thirty-five feet from her stem, and the oil barge was at that time swinging off to starboard, it is impossible that the port scow could have become streaked with black paint from the oil barge all along her port side. As to the cut in the port scow's starboard bow, the testimony is about evenly balanced, libellant's witnesses maintaining that if it had been caused by the stem of the "Henderson" the shock would have materially injured the stem-iron and damaged the hull of the latter, while claimant's witnesses contend the opposite. No explanation of the cut is, however, offered by libellant's witnesses except the surmise of Captain Shaver, the owner of the "Henderson" (Transcript of Evidence, p. 1346), as to the "Henderson's" "doctor pump." This was a cast iron pump weighing about a couple of tons, situated in the "Henderson" just about where the boat was struck; its frame was square, with sharp square corners, and part of it was driven across the ship and under the boiler by the force of the collision. Captain Shaver bases his guess upon information to the effect that the cut in the scow was square and sharp, whereas the stem-iron of the "Henderson" had rounded corners; but Captain Shaver never saw the cut in the scow; and the suggestion of the "doctor pump" is simply his contribution towards trying to fit the facts of libellant's theory of the collision. But it is entitled to no more consideration than any other speculative hypothesis, and on closer scrutiny, it is submitted, becomes untenable; for if the port scow struck the "Henderson"

at an angle sufficiently obtuse for the corner of the "doctor pump" to make a cut in the *starboard bow* of the scow, and beginning at a point only thirty-five feet from the "Henderson's" stem, it is impossible that the remaining one hundred and nine feet of the "Henderson's" length (deducting 36 feet for the beam of the scow, and the "Henderson, being 180 feet long, including her wheel) could have escaped prior injury by the center scow which projected fifty feet ahead of the port one. A glance at Diagram No. 3, drawn to scale according to the evidence, will show, by the line XY, that the port scow could not possibly have struck any straight edged project, such as the side of the "Henderson" with her *starboard bow* unless the center scow struck it too, and that within about eighty feet from where the port scow struck. The only possible explanation of this cut in the port scow and of the injury to the center scow (there being no evidence that the "Henderson" was struck in more than one place) is that the port scow scraped along the side of the oil barge until it stuck the stem of the "Henderson," which had been forced outwards by the blow of the center scow just enough to cut the port scow a little to starboard of her own stem. This also renders immaterial much of libellant's testimony to the effect that, the beam of the scows being thirty-six feet and the distance from the stem of the "Henderson" to the side of the oil barge being only about fourteen feet six inches, by reason of the manner of their being lashed together, it would be impossible for the scow to slide along the side of the oil barge and be cut into by the "Henderson's" stem on her own starboard bow (Transcript of

Evidence, p. 1347) ; for it is undisputed that the "Henderson's" lines were parted and that she was forced around back of the stern of the oil barge by the force of the blow, and it will readily be seen that, if this blow was delivered by the center scow, projecting fifty feet in advance of the port scow, by the time the port scow reached the "Henderson" the latter would have been forced around enough to inflict the cut in the blunt bows of the former on the starboard, and not on the port, side.

Diagrams Nos. 3 and 4 herein have been drawn to scale according to the dimensions given in the evidence. In Diagram No. 3 the sidelights J and K of the "Samson" are placed sixteen feet apart, and the point E is four hundred feet ahead of the bow of the "Samson." E represents the nearest point at which, according to the testimony, both lights of the "Samson" can be seen at once. Consequently the angle at which the sidelights on the "Samson" shine across the line of her course is represented by the angle JER on the diagram. As the lights on the "Samson" are placed just aft of the pilot house (Transcript of Evidence, pp. 589-590), and as it appears (Transcript of Evidence, p. 602) that the pilot house was about thirty-five feet from the "Samson's" stem, the lights J and K in Diagram No. 3 have been placed thirty-six feet from the "Samson's" stem, making the total distance from the lights to E four hundred and thirty-six feet. It is therefore easy to calculate the size of the angle JER—something less than 2 degrees. As regards the "Henderson" and the oil barge there is no testimony as to the position of the sidelights except that the law provides that they be fitted

with three-foot screens (Transcript of Evidence, pp. 210-211); but as the "Samson's" lights had such screens (Transcript of Evidence, p. 590) it has been assumed, in making up Diagram No. 4, that the angles of the side-lights on both the "Henderson" and the oil barge would be great enough to cross their respective course-lines four hundred feet ahead of the stem of each, at the points K and L respectively. As a matter of fact, the resulting angles ALE and HKC are more obtuse than could be the case, as it will be observed that the lines LE and KH have been drawn well outside the outboard lines of the vessels, in order to err rather in favor of libellant, as appears hereafter. Yet even so, the angle ALE (the angle at which the starboard or green light of the oil barge would cross the line of her course) is seen to be something less than 5 degrees.

Diagram No. 5 is made up from libellant's Exhibit 1 rather than from libellant's Exhibit 2, both because libellant's Exhibit 1 shows less deflection in the course of the "Henderson" and the oil barge, and is therefore more favorable to libellant's contention, and also because marking on libellant's Exhibit 1 are as accurate as counsel could prevail upon the witness to make them (See Transcript of Evidence, pp. 149-155-165-166-167), whereas the marking on libellant's Exhibit 2 were not intended to be anything but approximate (See Transcript of Evidence, pp. 217-218). From this diagram it appears that while the "Samson" was on the course between D, where she was first sighted by Captain Sullivan, to E, where Captain Sullivan located her at the time she gave the first whistle, her red or port light could

not have been seen by anyone on the Puget Island side of the line PR, drawn from P, a point four hundred ahead of D, at an angle of 13-5 degrees to the line DE. Since libellant's Exhibit 1 shows the oil barge to have whistled about halfway between the points A and B, it is obvious that between the time of sighting the "Samson" and the time of blowing the first whistle no one on the oil barge could possibly have seen both lights of the "Samson;" yet the testimony is undisputed that both these lights were in full view. Similarly the point where the line QR intersects the course of the oil barge represents the first possible point where those on the oil barge could have seen both lights of the "Samson" while the "Samson" was on the course from E to F, between the first and second whistles. In other words, if the accident occurred as claimed by libellant, the "Samson's" two lights could have become simultaneously visible on the oil barge only at a point about halfway between the positions of the oil barge at the first and second whistles respectively.

From the markings on libellant's Exhibit 1 (and it should be noted that in marking up Diagram No. 5 only the finally corrected locations have been used; compare Diagram No. 2) it will be seen that the line TVBS, drawn through both the point of location of the oil barge at the second whistle and the point of collision and barely touching at the point V the course of the oil barge previous to the second whistle, as indicated by Captain Sullivan, represents the course of the oil barge furthest to port and most in line with the ranges, which according to the testimony, she could possibly have adopted

after sighting the "Samson" at the point A. The point V therefore represents the earliest possible position at which the oil barge could have taken that course. Yet the line VX, drawn from that point and not from a point four hundred feet ahead thereof (in order again to err in favor of libellant), at an angle of 43-5 degrees with the line TVBS, intersects the "Samson's" course from F, her location at the second whistle, to C, the point of collision, only about one hundred feet from that point of collision. In other words, the starboard or green light of the oil barge, even assuming it to have been visible four hundred feet ahead of the oil barge at the impossibly large angle shown in Diagram No. 4 would never have appeared to those on the "Samson" until within about one hundred feet of the point of collision. It is therefore obvious that both the red light of the "Henderson" and the green light of the oil barge could not have been almost continuously visible to those aboard the "Samson," as has been repeatedly testified, by the only persons in a position to know, to have been the case.

The testimony has been analyzed thus at length, not in order to complicate the case, but in an endeavor to bring order out of chaos; and it is submitted that only claimant's version of the collision suffices satisfactorily to explain the many apparent inconsistencies and conflicts in the evidence. What may be termed the "unconscious" testimony of Captain Sullivan, Martinson and Crossen—the "internal evidence" afforded by their remarks—the paint on the port scow, the cut in her starboard bow, and the injury to the center scow, taken in connection with the comparative dimensions of the ves-

sels and the fact that the "Henderson's" side was struck in only one place, together with the angles of the sidelights as shown in Diagram No. 5—all combine to show that libellant's version is not correct. Enough has been said, however, to show that all the above testimony fits perfectly into claimant's version; and it needs only a glance at the markings made on libellant's Exhibit 17 and Standard Oil Exhibit 1 to show that the conflict between the undisputed testimony for both libellant and claimant in regard to the lights and the mathematical possibilities of the case would not exist if claimant's version were accepted. Diagram No. 6, traced from libellant's Exhibit 17, and Diagram No. 7, traced from claimant's exhibit A, are sufficient to prove this fact.

CERTAIN PROMINENT FACTS DISCLOSED BY THE EVIDENCE.

The evidence clearly shows beyond any question, certain prominent facts. A few of these it may be well to recapitulate.

(1) At all times from the time the two vessels came in sight of one another up to within a few seconds of the collision, both lights of the "Samson" were visible from the oil barge and "Henderson" and both lights of the oil barge and "Henderson" were visible from the "Samson."

(2) Both the starboard and the port barges of the "Samson's" tow carried a bright white light. If both of these lights were not seen by those in charge of the oil barge and "Henderson" it was because no sufficient

lookout was maintained on those vessels. Sullivan himself testifies that he was watching the range; that it is to say, looking backward. Martinson, lookout on the oil barge, and Crossan, lookout on the "Henderson," admit that they were not attending to their duties.

(3) All of the barges of the "Samson" tow were in good condition at the time of the collision. After the collision, the port barge and the center barge were both injured—the center barge more severely than the port barge.

(4) This injury to these barges doubtless came from the collision with the "Henderson," as there is no evidence that it came from any other cause; indeed, the witnesses for the libellant who saw the collision all state that, in their judgment, if the "Henderson" was struck by the port barge, as they claim she was, the center barge must have struck the "Henderson" at a point farther aft, but the evidence shows that the "Henderson" was not struck at a point aft of the house, so that it may be said to be established that the center barge struck the "Henderson" about 35 feet from its stem.

(5) The rock barge No. 9 drifted from the point of collision to the place where it was anchored. It was anchored so near the Washington shore that the "Samson" in removing it the next morning dug up mud with her propeller.

(6) The rock barges Nos. 27 and 8 were anchored from the "Samson."

(7) The oil barge must have drifted at least 500 feet from the point of collision before she was anchored. When she anchored she tailed down Clifton Channel.

(8) If the collision occurred at the place indicated by Sullivan, and claimed by the libellant to be the true location of the collision, the course of the "Samson" and her tows is unintelligible, for from that point, going in the direction in which the "Samson" must have sailed and going at the speed at which it is admitted the "Samson" was travelling, it would have been difficult, if not impossible, for the "Samson" to have kept her rock barges and herself from going on the sands of Tenas Il-lihee Island.

(9) The usual and natural course for each vessel was along the lines testified to by Jordan and other witnesses for the claimant; in other words, all witnesses agree that the natural and reasonable course of a vessel towing down stream was to keep above the range line until at or below the point where the collision must have occurred, whatever location may be accepted as the true place of the collision. On the other hand, the natural and usual course for a vessel coming up stream with a tow, to keep under the lee of Puget Island as nearly as possible, and this course was the course usually pursued by Sullivan himself.

IV.

THE BURDEN IS THEREFORE ON LIBEL-
LANT TO SHOW THAT THE "HENDER-
SON" WAS NOT IN FAULT.

It is settled law that, where one vessel has deviated from her course, even for a cause so beyond her control as to make the ensuing accident inevitable, the burden is on her to prove that such deviation was without fault on her part.

1. *The Merchant Prince*,
Law Reports, (1892) 1 Prob. Div. 179,
In the Court of Appeal, 1892;
2. *The Olympia*,
61 Fed. R., 120,
C. C. A., 6th Cir., 1894;
3. *The F. W. Wheeler*,
78 Fed. R. 824,
C. C. A., 6th Cir., 1897;
4. *The Ohio*,
91 Fed. R., 547,
C. C. A., 6th Cir., 1898;
5. *The Fortana*,
119 Fed. R., 853,
C. C. A., 6th Cir., 1903;
6. *The Edmund Moran*,
180 Fed. R., 700,
C. C. A., 2nd Cir., 1910;
7. *Nicholas Transit Co. v. Pittsburgh Steamship Co.*,

196 Fed. R., 65,

Dist. Ct., W. D. N. Y., 1912;

8. *The Lackawanna*,

201 Fed. R., 773,

Dist. Ct., W. D. N. Y., 1913.

The first case cited, that of the *Merchant Prince*, is one frequently quoted in the books. The rule was there carefully formulated by Lord Justice Fry as follows:

“The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable, or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided.” (At page 189.)

It is submitted that none of Libellant’s testimony is successful in discharging Libellant from this burden. Consequently, according to the equally well-settled principle that where one vessel is solely to blame for a collision she must pay the damages, the damages herein should be assed to Libellant:

9. *Union Steamship Co. v. N. Y. & Va. Steamship Co.*

65 U. S. (24 How. 307,

16 L. C. P. Co. Ed. 699;

U. S. Supr. Ct., 1861;

10. *The Bywell Castle*,
Law Reports, 4 Prob. Div., 219,
In the Court Appeal, 1878;
11. *The Maggie J. Smith*,
123 U. S., 349,
31 L. C. P. Co. Ed., 175,
U. S. Supr. Ct., 1887;
12. *The Phoenix*,
50 Fed. R., 330,
Dist. Ct., S. D. N. Y., 1892;
13. *The Umbria*,
166 U. S., 404,
41 L. C. P. Co. Ed., 1053,
U. S. Supr. Ct., 1897;
3. *The F. W. Wheeler*,
Supra;
4. *The Ohio*,
Supra;
14. *The Lake Shore*,
201 Fed. R., 449,
Dist. Ct., N. D. Ohio, 1912.

The case of *The Phoenix*, cited above, is somewhat similar to the case at bar. In that case Libellant's canal boat, in tow of the steam tug *Atlanta*, was the outer of two boats on the *Atlanta's* port side, here being another boat on her starboard side. When less than half-way across the North River, the fog shut down somewhat thickly near the water, but much less higher up. Fog signals indicating a tow had been regularly given

by the Atlanta, and when the hull of the Phoenix as well as her mast, became visible at a considerable distance off the port bow, the Atlanta gave one whistle which the Phoenix answered, but the Phoenix delayed reversing until Libellant's canal boat came in sight about fifty feet away. The Atlanta, seeing that the Phoenix kept on her course and that a collision was imminent, had reversed her engines when from two hundred to three hundred feet still separated the vessels, but Libellant's canal boat was struck a little forward of amidships. The Court said:

“The evidence leaves no doubt that the Phoenix had timely notice of the Atlanta's presence with a tow a little on her starboard hand, and that she saw the smokestack of the Atlanta in abundant time to have avoided her, as it was her duty to do, either by going to starboard or by stopping and reversing. She delayed reversing according to her own pilot's testimony, until the canal boat came in sight not over 50 feet distant. This delay fixes the blame upon the Phoenix.” (At p. 331.)

Similarly in the case at bar, the fact that Captain Sullivan, although he saw the “Samson” and her tow bearing straight down upon him without apparent change of course, as he testifies, took no measures to avoid the possible collision until just before the collision occurred (even according to Libellant's version), fixes the blame for the accident solely upon the “Henderson” and her tow.

AND, THE EVIDENCE BEING RATHER THAT THE "HENDERSON" AND NOT THE "SAMSON" WAS TO BLAME, THE DAMAGES SHOULD EITHER BE ASSESSED TO THE "HENDERSON," OR ELSE THE LIBEL SHOULD BE DISMISSED, BOTH PARTIES PAYING COSTS BY THEM MADE.

Even if the "Samson" could have avoided the accident, as it now appears she perhaps might have done, by adopting a different course of action, such as stopping sooner, or steering to port across the bow of the oil barge, nevertheless the "Henderson" and the oil barge, having by their own wrongful maneuver placed the "Samson" and her tow in a position of danger, are solely responsible.

10. *The Bywell Castle,*
Supra;

11. *The Maggie J. Smith,*
Supra;

4. *The Ohio,*
Supra.

In the *Bywell Castle*, cited above, a leading case on the point, this question was carefully considered. The screw steamer *Bywell Castle* and the paddle wheel steamer *Princess Alice* were approaching each other on the Thames, red light to red light. The *Princess Alice* starboarded her helm for some unexplained reason, after having had to do so slightly in order to pass a powder hulk, so that she crossed the bows of the *By-*

well Castle and the latter saw her green light. The Captain of the Bywell Castle thereupon put his helm hard aport, probably in an effort to escape collision, but struck the Princess Alice on her starboard bow and sunk her, with the result that over five hundred passengers and crew of the latter were drowned. At the first hearing before Sir R. Phillimore and the Elder Brethren of Trinity House, both vessels were held to be in fault; but in the Court of Appeal the Lords Justices James, Brett and Cotton held that the Princess Alice was alone in fault.

“A ship has no right,” said Lord Justice Brett, at page 223, “by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct.”

And Lord Justice Cotton (page 228), in a clear and careful opinion, formulated the rule as follows:

“The sound rule is that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the fault or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best.”

This case is quoted with approval in the Ohio, above cited, where the vessel *Siberia*, probably owing to the suction of an overtaking steamer, sheered from her prop-

er course and collided with the Ohio, a vessel coming in the opposite direction. Judge Lurton, just before citing the *Maggie J. Smith* and the *Bywell Castle* (both cited above), said:

“The Ohio was placed in a situation of extreme danger by the wrongful deviation of the *Siberia* from her course. The rule is well settled that when one vessel by her own wrongful maneuver places another in a situation of extreme peril, and the latter does not act with that promptness and accuracy of judgment which might be expected when there was complete presence of mind, and happens to delay or do something, which turns out to have been a mistake, she will not thereby become such a contributor to the mischief as to render her liable for damages.” (At page 558.)

It is, therefore, clear that no blame can be attached to the “*Samson*” for neglecting to do whatever it may be contended she might have done to avoid the collision. She was on her course, if anything a little closer to Puget Island than was customary, and had no reason to believe that the “*Henderson*” and the oil barge, although apparently steering a peculiar course, would not finally adopt the course indicated by the signals from the oil barge in time to escape a collision. When, at the last moment, it became certain that they would not do so, Captain Jordan on the “*Samson*” put his helm hard aport, swinging the tow around so as to head into Puget Island. It is obvious that this was the only thing he could have done under the circumstances; and it is sub-

mitted that the evidence is sufficient to show that had he not done so, and the rock scows had hit the oil barge squarely instead of a glancing blow, not only the "Henderson" but the oil barge as well would have been sunk. Such being the circumstances, the language of the cases unequivocally prohibits the imputing of any negligence to the "Samson" sufficient to justify the division of damages.

The foregoing has of course been predicated upon the acceptance by this Court of Claimant's version of the accident pursuant to the analysis of the testimony given above. Should, however, this Court consider Claimant's version as not true, deeming it merely a possible inference from the testimony, and regard the case as one in which neither party has established, to the satisfaction of the Court, the negligence of the other, then, it is submitted, this libel should be dismissed, each party to pay costs by them made.

15. *The Centurion*,

100 Fed. R., 663,

C. C. A., 6th Cir., 1900.

In this case the collision was caused by a sudden sheer of the steamship Marshall which struck the steamship Centurion on the port side just as the two vessels were passing each other, in a river from twelve hundred to fifteen hundred feet wide, each going at the rate of from seven to eight miles an hour. There was much testimony on the question of suction, but the evidence failed to establish the negligence charged by either party against the other, or to show the true cause of the acci-

dent. The case was disposed of by Judge Day (pp. 666 to 667) in the following words:

“The case seems to be, if not strictly an accident occurring through inscrutable fault, one wherein there is a failure of proof to establish the negligence charged by one party against the other. This was the conclusion reached by the learned judge who heard the case in the District Court. Finding no error, the decree is affirmed; each party to pay costs by them made, respectively.”

It must be admitted that, unless Claimant's version of the accident be accepted, the testimony for Libellant is of such a nature as to make any reasonable reconstruction of what actually occurred practically impossible. If, therefore, this Court finds itself in a dilemma of this nature, it is submitted that the Centurion indicates the proper course of action.

V.

EVEN ASSUMING THE “SAMSON” TO HAVE BEEN IN FAULT, AND LIBELLANT'S VERSION TO BE THE TRUE ONE, THE EVIDENCE SHOWS SUCH A DISREGARD BY THE “HENDERSON” AND HER TOW OF BOTH THE RULES OF NAVIGATION AND THE DICTATES OF PRUDENCE AS TO WARRANT THE DIVISION OF DAMAGES ACCORDING TO THE FAMILIAR RULE.

IN the PILOT RULES FOR ALL HARBORS, RIVERS AND INLAND WATERS OF THE UNITED STATES, EXCEPT THE GREAT LAKES AND THEIR CONNECTING AND TRIBUTARY WATERS AS FAR EAST AS MONTREAL AND THE RED RIVER OF THE NORTH AND RIVERS EMPTYING INTO THE GULF OF MEXICO AND THEIR TRIBUTARIES (hereinafter called the "Pilot Rules"), as amended by the Board of United States Supervising Inspectors, Steamboat Inspection Service, in February, 1911, and approved by the Secretary of Commerce and Labor, under the authority of an Act of Congress approved June 7, 1907, and the Act of Congress approved February 14, 1903, to become effective on and after April 1, 1911, Rule I reads as follows:

RULE I. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the **DANGER SIGNAL.**

The language of this rule is identical with that of Rule III of the Steering and Sailing Rules promulgated by the Act of Congress approved June 7, 1897, with the exception of the addition of the words "The **DANGER SIGNAL.**"

No recapitulation of the testimony for Libellant is needed to prove that whatever else Captain Sullivan did,

he did not obey this rule. According to his own story, he was steering very close to the Oregon shore, so close, indeed, that when he put his helm hard aport just before the collision he recognized the risk of going ashore, but preferred that to being run into (Transcript of Evidence, p. 117). He had noticed the "Samson" and her tow bearing down upon him on an apparently unchanged course; this, after the exchange of whistles that had taken place, was a situation which he as a reasonable man and experienced navigator, could hardly have "understood"; yet he did nothing either to induce the "Samson" to alter her course or to prevent the possibility of collision by some action on his own part, until just before the collision, when he blew the second whistle. Thus not only did he disregard the provisions of the "Pilot Rules" covering such cases, but, it is submitted, he failed to take even the most ordinary and obvious precautions.

RULE XI of the "Pilot Rules," identical with ARTICLE 27 of the Steering and Sailing Rules in the Act of Congress approved June 7, 1897, is to the effect that

"In obeying and construing these rules due regard shall be had to all DANGERS OF NAVIGATION AND COLLISION, and to any SPECIAL CIRCUMSTANCES which may render a departure from the above rules necessary in order to avoid immediate danger."

This rule gives a wide latitude for such individual action on the part of those in command of vessels in danger as the emergency may seem to call for; but it cannot

reasonably be held to cover and excuse a total lack of precautionary action. Yet Captain Sullivan (Transcript of Evidence, pp. 118, 143-144, and 168-169) has endeavored to use that rule as an excuse and a justification for his failure to do anything but blow one whistle about thirty seconds or a minute before the collision occurred.

Such conduct on the part of Captain Sullivan, the pilot of both the oil barge and the "Henderson," clearly was negligence sufficient, even if Libellant's version of the accident be accepted *in toto*, to charge the "Henderson" and the oil barge with the responsibility for the collision equally with the "Samson." In such cases it is the settled rule of Admiralty jurisprudence that the damages be divided:

9. *Union Steamship v. N. Y. & Va. Steamship Co.*,
Supra;
16. *The Maria Martain v. Northern Transportation Co.*,
79 U. S. (12 Wall.) 31,
20 L. C. P. Co. Ed., 251,
U. S. Supr. Ct., 1871;
17. *The Columbia*,
23 Blatchf., 268;
C. C. E. D. N. Y. 1885;
18. *W. Va. Central & P. Ry. Co. v. The Isle of Pines, et al.*,
24 Fed. R., 489,
Dist. Ct., S. D. N. Y., 1885;

19. *The A. W. Thompson*,
39 Fed. R., 115,
Dist. Ct. S. D. N. Y. 1889;
20. *The Louise*,
52 Fed. R., 885;
C. C. A. 4th Cir. 1892;
21. *The Lisbonense*,
53 Fed. R., 293,
C. C. A. 2nd Cir. 1892;
22. *The George W. Childs*,
67 Fed. R., 269,
Dist. Ct. E. D. Pa. 1895;
23. *The Victory*,
68 Fed. R., 395,
C. C. A., 4th Cir. 1895;
24. *The Maryland*,
182 Fed. R., 829,
Dist. Ct. E. D. Va. 1919.

This principle is too familiar to need elaboration. In *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, cited above, the United States Supreme Court has concisely formulated it, in the opinion of Mr. Justice Clifford (L. C. P. Co. Ed. p. 701), as follows

“If the fault was one committed by the libellant alone, proof of that fact is of itself a sufficient defense; or if the respondent alone committed the fault, then the libellant is entitled to recover; and clearly, if both were in fault, then the damages must be equally apportioned between them.”

Its application to cases like the one at bar was made certain by the same Court in the later case of the *Maria Martin*, also cited above, where Mr. Justice Clifford again delivered the opinion:

“Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from taking every proper precaution required by the special circumstances of the case to prevent a collision, as the Act of Congress provides that in obeying and construing the prescribed rules of navigation, due* regard must be had to the special circumstances rendering the departure from them necessary in order to avoid immediate danger.” (L. C. P. Co. Ed. p. 255).

(*So in L. C. P. Co. Ed.)

This language has been frequently quoted with approval in subsequent cases (See *The Louise* and *The Victory*, cited above); and the whole matter has been ably summed up, both in the United States Supreme Court and in a later case in the Circuit Court of Appeals for the Fourth Circuit, as follows:

“If there be any uncertainty as to the intention of the approaching vessel, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel with reference to her movements, and it behooves those in charge to be prompt in availing themselves of every resource to avoid, not only a collision, but the risk of such a catastrophe.” (Simonton, J., in *The Louise*, cited above, at p. 888.)

“Sailing rules were ordained to prevent collisions between ships employed in navigation, and to preserve life and property embarked on that perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do in that direction, without becoming responsible for its consequences, in case it occurs.” (Mr. Justice Clifford, in *The American v. Camden & Amboy R. R. Transp. Co.*, 92 U. S. (2 Otto) 432, 23 L. C. P. Co. Ed., 724; U. S. Supr. Ct., 1876, cited in *The Louise*, *Supra.*)

THE DAMAGES.

J. H. Johnson was the first witness called on behalf of the libellant to establish the amount of the damages. Over the objection of the claimant he testifies, on page 1459, that it would cost in 1911 to replace the “M. F. Henderson” \$51,000.00. On page 1461 he estimates the value of the “Henderson” at the time of the collision at \$44,000.00. On pages 1464 and following he gives a detailed statement. The details of this statement were taken, for the most part, from information furnished him by Captain Shaver, president of the libellant. On page 1472 he admits that some of the floor timbers of the “Henderson” were soft and rotten, and on page 1473 he admits that these timbers would have had to be repaired in three or four years. On page 1475 he admits that the hull, when he saw it after the accident, was in such shape that it could have been repaired. On page 1476 he admits that such repairs would have cost about

\$2500.00 and would have made the hull as good as it was before the accident. It appears from his testimony, page 1533, that he did not examine the hull of the "Henderson" until February, 1913. The award of the District Court was based practically, if not entirely, upon the testimony of this witness. On cross-examination this witness testifies that in large measure it was hear-say, or based upon hear-say and that the witness was not in a position to testify regarding the damages.

Captain J. W. Shaver was the next witness on damages. It appears from his testimony, pages 1553 to 1554, that he had bought and sold vessels. On the same page he testifies that the "Henderson" at the time of the collision was worth \$45,000.00, and yet the record furnished by the books introduced in evidence by Conway, pages 1605 and following, shows that the new "Henderson" cost \$27,726.68. With this cost a part of the salaries of the officers of the Shaver Transportation Company was included, though the new "Henderson" was built by contract. Captain Shaver himself, page 1557, introduced libellant's Exhibit 27, showing the earnings and disbursements on account of the "Henderson" for the year 1909, 1910 and the first six months of 1911. From this exhibit it appears that during the year 1909, without making any deduction for depreciation, the net earnings of the "Henderson" were not quite \$14,000; that for the year 1910, again making no deduction for depreciation, the net earnings of the "Henderson" were \$14,007.30; and that for the six months of 1911, again making no deduction for depreciation, the earnings of the "Henderson" were \$3257.12. These earnings include

a part of the office expenses of the Company, it may be said of the fixed charges of the company. This evidence was also introduced over the objection of the claimant. It is significant, however, that during the year 1911 the gross earnings of the "Henderson" were not 50 per cent of the gross earnings for the corresponding months of 1909 and 1910. No explanation is made of this unless it be the explanation made by the witness Hosford, who testifies on page 1596 that at the time the "Henderson" was sunk there was no passenger route upon which she could earn any profit. It appears also from the testimony of Captain Shaver, page 1663, that his company carries on their books no depreciation account and on pages 1695-1696 he was wholly unable to reconcile why he claims that the old "Henderson" was worth \$45,000 whereas the new "Henderson," which was as good a boat, cost less than \$38,000.00.

Captain O. W. Hosford was the next witness on behalf of the respondent. He valued the "Henderson" at the time she was sunk, at \$45,000. It appears from his evidence on page 1588 that he bought the "Weown," when she was about three years old, for \$26,000, and he estimates that a boat of that character was worth \$10,000 less than the "Henderson." On page 1592 he states that he thinks the "Hercules" was as good a boat as the "Henderson."

The next witness on behalf of the libellant, was A. M. Conway, bookkeeper for the Shaver Transportation Company. He knew nothing but what the books of the Shaver Transportation Company showed. He testifies,

page 1606, that the total cost of raising the old "Henderson" was \$8,424.99, and on page 1610 that the total cost of the new "Henderson" was \$27,726.68. Among the items of cost of salvage are included a charge for the "Cascades" at the rate of \$150.00 per day. The evidence shows that it cost less than \$100.00 a day to operate the "Cascades" and that she is a boat less valuable and of less earning power than the "Henderson"; that the net earnings of the "Henderson" during the six months prior to the collision were only \$30.00 per day. Another charge included in the salvage was the services of the "Wauna" at \$125.00 per day. The "Wauna" was a smaller boat than either the "Henderson" or the "Cascades," could be operated more cheaply than either of them and her earning power was less than that of the "Henderson" or the "Cascades." A charge was made for each of these two boats for a period of fourteen or fifteen days. The record, we may say, is replete with items showing extortionate charges for the vessels owned by the libellant which were engaged in the raising of the "Henderson."

Charles M. Nelson was also a witness on behalf of the libellant. He was the proprietor of the Portland Shipbuilding Yard, which built the hull of the new "Henderson." The contract price was \$15,500, and he testifies, page 1756, that in his judgment it would have cost as much to have repaired the hull of the "Henderson" and make her as good as before the accident as a new hull would have cost. He does not deny, however, that he had a talk with Daniel Kern at the time the hull of the old "Henderson" was on the ways at his yard, and

that he remembers Kern speaking to him about buying the hull. He does not recollect having told Kern that he would fix up the hull and fit her up as a barge for the sum of \$3000, but he does not deny that such a conversation took place and that to have fixed it up and fitted it up for a barge, the hull would have been as strong as the hull on the "Henderson." (Record, p. 1759).

William B. Honeyman was next called as a witness on behalf of the libellant. He testifies that he is a marine surveyor and that he examined the "Henderson" when she was hauled out on the ways at South Portland and made a thorough examination of the hull and machinery in conjunction with Captain Crowe. He put the valuation of the boat at between \$35,000 and \$36,000. (Record, p. 1766). He admits that the statement of salvage expenses he got from Captain Shaver.

The first witness called for the defense was Joseph Supple. He was a ship builder and has been in business "on his own hook" for about thirty-five years, and was acquainted with the "Henderson" and with her structure. He looked at the "Henderson" while on the ways after she was wrecked. On page 1782 he states that it would cost to duplicate the "Henderson" in July, 1911, \$40,000 and that with ten years' wear she would be worth, in his judgment, not over \$25,000. He testified particularly in regard to the condition of the hull and the injuries. On page 1783 he testifies that the hull was in a repairable condition and on the same page testifies *that he would consider a reasonable value to put*

the "*Henderson*" in as good shape as it was before the accident, the sum of \$16,000. On page 1784 he testifies that, in his judgment, there was not more than two years' more usage in the hull. One of the items of expense presented by the libellant was \$310.00 for pulling the boat on the ways of the Portland Ship Yards. This witness testifies, page 1786, that \$100.00 was what was usually charged for that service. On cross-examination, page 1790, this witness testifies that in 1901 it would have cost about \$30,000 to have built a boat like the "*Henderson*." On pages 1796-7, on cross-examination, he testifies that, in his judgment, \$2500.00 *would have been a good price to put the hull of the "Henderson" in as good shape as it was before the collision.* This testimony he repeats on pages 1800 and 1801, also on cross-examination, and on pages 1803 and 1804 he states that to put her back in as good shape as she was before would probably cost \$28,000, including machinery and everything, but that she would be worth \$3000.00 more after the repairs than before.

Albert Duncan was the second witness called on the question of damages on behalf of the defense. He had been engaged as a shipwright in Portland for twenty-five years. He had examined the hull of the "*Henderson*." On page 1809 he testifies that, in his judgment, *the hull of the "Henderson" could be repaired and put in the same condition as before the wreck for the sum of \$4000.*

Joseph Paquet was the next witness called on behalf of the claimant on the question of damages. He had

been in the boat building business in Portland for about 40 years; had built and repaired all manner of boats and raised quite a number of boats which had been sunk; he was also acquainted with the "Henderson." On pages 1825 to 1827 he testifies that in his judgment the "*Henderson*" should have been raised for \$5000. On page 1831 he testifies that the *hull could have been put in as good condition as before the wreck for \$4500.00*. On page 1838 he testifies that in 1911 he thinks that a boat such as the "*Henderson*" could have been hired in this market for about \$750.00 a month. On page 1839 he testifies that such a boats as the "Henderson" fully equipped and new would cost about \$38,000. On page 1840 he testifies that such a boat as the "Henderson" built in 1901 and having been operated for ten years would be of the value in this market of \$25,000. On page 1860, on cross-examination this same witness testifies that in his judgment the "Henderson" could have been built in 1911 for \$38,000 and *that as she was ten years old she was worth \$25,000.00*.

Robert M. McIntosh, another witness on behalf of the claimant, testifies that he was a ship carpenter and contractor and had been engaged in that business for over 30 years and had seen the hull of the "M. F. Henderson." On page 1877 he testifies that, in his judgment, *the hull could have been repaired*; that he made a careful examination of it and a careful estimate and that in his judgment, *the hull could have been fixed up as good as it was before the collision for \$4,000*.

Peter Carstens, another witness called on behalf of the defense, testified that he had been with the O. R. &

N. Co. for 32 years and has always been connected with steamboats,—either building steamers or running steam boats or patching up steam boats. He testifies that he was familiar with such boats as the “Henderson” and has been handling that kind of boats the most of the time, was familiar with their construction and with repairing them. He made an examination of the hull of the “Henderson” on the 14th day of August, 1911, and estimated that *it would cost to repair the hull \$4162.00; that to rebuild the upper works would cost \$8812; moving the machinery would have cost \$2000.* On page 1887 he gives this estimate and on the same page testifies that, in his judgment *such a vessel as the “Henderson,” allowing ten years for depreciation and having had incidental repairs made to her from time to time, was worth about \$20,000.* On page 1893 he testifies that he found *the condition of the hull to be such that it would need repairs within a year to the extent of \$6000.00 had there been no collision.* This witness had had much experience in raising boats on the Willamette and Columbia rivers. He testifies on page 1896 that it was *not necessary in raising boats to have more than one tug boat.* On the same page he testifies that to have built a new boat like the “Henderson” in 1911, using such salvage as could be obtained from the “Henderson” would cost \$23,000. A detailed report made by this witness to the Standard Oil Company on August 14, 1911, is found on page 1905 and page 1906 of the record, and is in accord with his testimony.

Daniel Kern, the President of the claimant, was called as a witness on the question of damages. He

had raised several boats in the Columbia River and testifies on pages 1908 and 1909 what apparatus it would be necessary to provide and the manner in which a boat sunk, such as the "Henderson" should be raised. He also testifies on pages 1909 and 1910 as to the reasonable rental value of boats like the "Cascades" and "Wauna." He was also familiar with the waters where the "Henderson" was sunk, and on page 1913 testifies that in his judgment a *reasonable sum to be expended for raising the "Henderson" would be \$5,000.00.* On page 1914 he testifies that he is acquainted with the "Henderson" and that his Company owns a boat of about the same character. This boat was the "Hercules." He testifies that though he had never built any new boats of that character he thinks that the "*Henderson*" at the time she was sunk *was worth about \$25,000.00* and that they carried their boat on their books at \$22,500.00. On pages 1922 and following he was closely cross-examined in regard to his estimate of the reasonable value of raising the "Henderson."

Other witnesses were called for the purpose of showing the exorbitant charges made by the libellant and testify pages 1926 to 1969. Daniel Kern was re-called by the libellant for further cross-examination, pages 1969 and following. He testifies that in his judgment the "Hercules" was a better boat than the "Henderson" and that she cost to build her in 1899, \$19,000.00.

Captain J. E. Copeland was also recalled for the purpose of showing the cost of the "Henderson." He testifies on page 1977, that at that time when he had

hired the "Henderson" he was informed by Captain Shaver, President of the libellant, that the "Henderson" had cost \$32,000.00. He was also examined in regard to *the manner of raising boats sunk in the Columbia*, and testifies, among other things, that *one tug boat was sufficient*.

Captain Shaver, called on rebuttal by the libellant, on page 1989, testifies that the "Henderson" when new cost \$31,000.00.

Tabulated, the evidence shows

	Value New	Value When Sunk	Cost of Repairing
Johnson	\$51,000	\$44,000	\$.
Shaver	38,000	45,000
Hosford		45,000
Honeyman		36,000
Supple	40,000	25,000	16,000
Paquet	38,000	25,000
Carstens	38,000	20,000	15,000
Kern		25,000

THE DAMAGES DEMANDED BY LIBELLANT ARE GREATLY EXAGGERATED.

If Claimant's version of the accident be accepted, of course no question as to Claimant's liability for damages will arise; but it has been deemed pertinent, in view of the possibility of the Court's adopting Libellant's version and dividing the damages, to present a

brief discussion of Libellant's evidence as to the amount of damages sustained.

In Libellant's amended and supplemental libels allegation is made that the value of the "Henderson" at the time of the collision was fifty thousand dollars (\$50,000.00), and the value of the supplies lost on her fifteen hundred dollars (\$1500.00), the salvage expenses ten thousand dollars (\$10,000.00), making a total of sixty-one thousand five hundred dollars (\$61,500.00); this, less sixteen thousand dollars (\$16,000.00), the value of the salvage recovered, leaves a total of forty-five thousand five hundred dollars (\$45,000.00), claimed by Libellant as damages herein. By these libels it also appears that Libellant is suing for the value of the "Henderson" as a total wreck.

The law governing the measure of damages in such cases is stated in Mr. Spencer's treatise on Marine Collisions as follows:

"Restitution is the rule in all cases where repairs are practicable, and compensation when the loss is total. The measure of damages in case of total loss is the market value of the vessel at the time of the collision, together with its cargo and freight, and such other losses as are a direct result of a collision. The market value of the vessel, and not its real or intrinsic value or cost of construction, is ordinarily the measure of damages. The recovery is limited to the market value, and damages in excess of such value may not be assessed by reason of additional value to the owner, owing to peculiar fitness for the trade in which it is engaged, or other-

wise; nor is the market value to be determined by what the owner would have been willing to take for the vessel, but it is the amount for which the vessel would have sold in the open market." (Spencer on Marine Collisions, Sec. 200, p. 360.)

25. *The Laura Lee*,
24 Fed. R., 483,
Dist. Ct., E. D. La., 1885;
26. *The City of Alexandria*,
40 Fed. R., 697,
Dist. Ct., S. D. N. Y., 1889;
27. *The Havilah*,
50 Fed. R., 331,
C. C. A., 2nd Cir., 1892.

In determining the value of a vessel at the time of the collision the Court necessarily has to consider all the circumstances bearing on such value that the evidence affords.

28. *La Normandie*,
58 Fed., 427,
C. C. A., 2nd Cir., 1893.

This, as pointed out by Judge Lacombe, at page 431 in the case last cited, is peculiarly the case where purchases and sales of property are not sufficiently frequent to give a readily ascertainable market value.

The testimony in the case at bar regarding value is voluminous and conflicting. Libellant's witness Johnston has testified that a new vessel similar to the old

“Henderson” would cost \$43,882.21 (Transcript of Evidence, p. 1466). It should be noted, however, that on cross examination the testimony of this witness seems to be composed largely of guesswork and hearsay from Captain Shaver, and Claimant’s proctor has moved to strike it out on that account (Transcript of Evidence, pp. 1479-1528). Libellant’s witness Conway, under objection, placed the cost of a new “Henderson” similar to the old at \$38,415.80 (Transcript of Evidence, pp. 1605, 1610); Captain Hosford, another witness for Libellant, placed the cost of a new “Henderson” (likewise under objection) at anywhere from fifty to fifty-five thousand dollars, although it was brought out on cross-examination that he had no definite basis for this opinion (Transcript of Evidence, pp. 1577-1584); and Captain Shaver (Transcript of Evidence, pp. 1562-1573) has testified at length concerning such a cost, all under objection by Claimant’s proctor. It is submitted that none of this evidence is competent as bearing upon the question of the old “Henderson’s” value at the time of the collision. To quote again from Mr. Spencer:

“The general rule is that the value of the vessel is the open market value at the place where the collision occurred. This has no reference to what it is worth to the owner, nor what he could have sold it for, but what it would have brought offered unreservedly in open market. * * * By the term ‘open market’ is not meant the price paid by the owner, but the same for which it would sell in open market. * * * The owner of the vessel

lost can only recover the market value of his ship, although this may be less than the price paid for it or less than the cost of construction." (Sec. 201, pp. 363-364).

The reasons for this rule were clearly set forth in the *Laura Lee*, cited above:

"In adjusting the loss claimed to have been incurred by the libellants, * * * we should consider that in every sale the consent of the owner of the thing sold must be obtained, and that it is often the case that such consent to sell has to be paid for by the purchaser in addition to the sum which may in the market fully represent the value of the thing sold. When the *Greenville* became a wreck, the power on the part of the libellants to consent to part with her ceased, and the owners of the *Lee* should not now be required to contribute any sum which represents the amount which the owners of the *Greenville* might have felt justified in asking from a purchaser for their consent to be deprived of her especial usefulness to them." (Boarman J., at p. 484.)

A fortiori, if the original cost of construction is not to be taken as the measure of damages, the estimated cost of a new vessel similar to the one wrecked is, to say the least, irrelevant. The quotations just made likewise render immaterial the testimony of Captain Shaver (Transcript of Evidence, p. 1554), that he would not have sold the "*Henderson*" for fifty thousand dollars.

It may, however, be noted that there is a wide discrepancy between the different values placed on the "Henderson" at the time of the collision by Libellant's witnesses and by the witnesses for the Claimant and for the Standard Oil Company. For instance, her value after ten years of use is put by both Supple (Transcript of Evidence, p. 1782) and Paquet (Transcript of Evidence, p. 1840, under objection) to be only \$25,000.00. The amount necessary to repair her hull and to put it in the same shape as it was in before the collision, is variously estimated at from \$16,000.00 (Supple, Transcript of Evidence, p. 1783) to \$4,000.00 (Duncan, Transcript of Evidence, p. 1809, subject to Libellant's motion to strike out, and McIntosh, Transcript of Evidence, p. 1877, under objection). Witness Carstens (Transcript of Evidence, pp. 1905-1906) in his letter of August 14, 1911, to the Standard Oil Company, estimated the cost of repairing the steamer and making her "as good as she was before the collision" at \$14,794.00, and the cost of a new boat similar to the old "Henderson" at \$26,500.00 (Claimant's Exhibit "E," objected to as incompetent, although not as being a copy, Transcript of Evidence, pp. 1904-1905). Many more instances of widely different expert opinions on this subject could be adduced; but it is submitted that enough has been here brought forward to indicate the doubtful dependability of the various values testified to by Libellant's witnesses. It needs only a cursory examination of the evidence to show that the damages demanded by Libellant are greatly exaggerated. For instance, the cost of raising the wreck is put by Libel-

lant at \$8,000.00 (Transcript of Evidence, p. 1625, under objection). It appears that this enormous sum is made up by charging rental for three of Libellant's vessels, one of which, the "Cascades," was almost constantly on hand at the scene of the wreck for four or five days at the rate of \$150.00 a day, while the "Shaver" and the "Dixon," which were employed at various times, were charged for at the rate of \$8.00 an hour. The "Echo," a launch carrying three men, was charged for at the rate of \$30.00 a day for 15 days. It is in evidence that the "Henderson" was Libellant's most profitable vessel (Transcript of Evidence, p. 1686); yet she only earned on an average of \$30.00 a day, and cost on an average of somewhat less than \$100.00 a day to operate (Transcript of Evidence, pp. 1681-1685), although Captain Shaver testified (Transcript of Evidence, p. 1681) that it cost \$125.00 a day to operate her. In the face of these facts it seems clear that a charge of \$150.00 a day for the "Cascades," a smaller boat than the "Henderson," and charges at the rate of \$192.00 a day apiece for the "Shaver" and the "Dixon," none of which vessels had the earning capacity of the "Henderson," is nothing short of exorbitant. Similarly it is in evidence (Transcript of Evidence, p. 1694) that the wages of the men employed on the "Echo" launch amounted to not more than \$225.00 a month; yet the charge made for her services by Libellant amounted to \$450.00 for only 15 days. Again it appears from the testimony (Transcript of Evidence, pp. 1697-1704) that most of the equipment on the "Henderson," such as mattresses, sheets, pillows, dining room table, safe, etc.,

were charged for as if new; although they were in fact old, and would bring nothing but second hand prices in the market. It is also worth noting that Libellant had no inventory of the equipment claimed to have been lost on the "Henderson" (Transcript of Evidence, pp. 1932-1733); and that all the information which Captain Crowe got in regard to the items of this nature enumerated by him as being on the "Henderson" was obtained from Captain Shaver (Transcript of Evidence, p. 1733).

It is submitted that Libellant's testimony as to the value of the "Henderson" at the time of the collision is both untrustworthy and grossly exaggerated; but, in addition, even according to Libellant's own itemized testimony, the allegations as to damage contained in the libel are far in excess of the truth. In the report made by Captain Crowe, Honeyman and Carstens, introduced in evidence over the objection of Claimant's proctor, and marked "Libellant's Exhibit 32" (Transcript of Evidence, pp. 1998-2003), the value of the old "Henderson" at the time of the collision is put at \$38,-304.00; the supplies lost at \$418.71; the provisions lost at \$83.99; and the cost of salving the wreckage at \$8,-414.84, making a total of \$47,221.54. The value of the salvage recovered is put at \$16,835.00. This, subtracted from the total as above, leaves only \$30,386.54, over \$15,000.00 less than the \$45,500.00 claimed as total damages by Libellant herein.

The damages suffered by Claimant, put at \$604.12 in Claimant's answer, are, it will be noted, with the exception of \$45.00 for the loss of time on the damaged

scows, testified to in detail by Claimant's witness Kern (Transcript of Evidence, pp. 1914-1917).

VII.

THE LIBEL SHOULD, IN ANY EVENT, BE DISMISSED AS TO BARGE NO. 8, BARGE NO. 9, AND BARGE NO. 27.

The evidence is undisputed that Barge No. 8, Barge No. 9, and Barge No. 27, comprising the tow of the "Samson," had no motive power of their own. Neither did they do any steering. In fact, they were as much in the control of the "Samson" as if they had been integral parts of the "Samson" herself. Such being the case, it is clear that no liability for the collision can attach to them and the libel as regards them should, in any event, be dismissed.

Mr. Spencer sums up the law on this point in the following words:

"Where a tug in charge of its own master in the ordinary course of its employment, undertakes to tow another vessel from one point to another by the use of its own motive power, having entire control of the course and direction of the movements of the latter, it is responsible for the proper navigation of both; and where injury is received under such circumstances, the aggrieved party must look to the tug and its owners for compensation, and not to the tow." (Spencer on Marine Collisions, Section 122, page 261).

29. *The James Gray v. The John Fraser*,
62 U. S. (21 How.) 184, 16 L. C. P. Co.
Ed. 106),
U. S. Supr. Ct. 1859.
30. *Sturgis v. Boyer*,
65 U. S. (24 How.) 110, 16 L. C. P. Co.
Ed. 591,
U. S. Supr. Ct. 1860.
31. *The J. H. Gautier and The Herbert Manton*,
5 Benedict, 469,
Dist Ct. S. D. N. Y. 1872.
Affirmed in 14 Blatchf. 37,
C. C. (S. D. N. Y.) 1876.
32. *The John Cooker and The James W. Eaton*,
10 Benedict, 488, 13 Fed. Cases, 665, (Fed.
Case No. 7337),
Dist. Ct. E. D. N. Y. 1879.
33. *The Doris Eckhoff*, 32 Fed. R. 555, Dist. Ct.
S. D. N. Y., 1887.

The proctors for Libellant, in their memorandum brief submitted to this court, have stated that the above-cited case of *Sturgis v. Boyer* is "against the position maintained by counsel" for Claimant. This brief adduced no proof of this statement; but it refers to the fact that in *Sturgis v. Boyer* the distinction that the tug alone, and not the tow, was responsible for the collision, was made only in the final decree after full hearing and in apportioning the liability between the several parties. Yet the proctors for Libellant, in the brief referred to, go on and quote the case of *The John*

Cooker and The James W. Eaton, cited above, as authority for the position that in the case at bar both the "Samson" and her three barges are to be held liable merely because a common stipulation covering both was filed by Claimant herein. It is submitted that the practice of the United States Supreme Court, exhibited in *Sturgis v. Boyer*, making the above-mentioned distinction in the final decree, effectively disposes of this latter contention made by Libellant's proctors. It may be conceded that this Court properly overruled Claimant's exceptions to this libel with regard to the liability of Barge No. 8, Barge No. 9, and Barge No. 27, seeing that the evidence in this case was not at that time before this court. But it is submitted that, now that the testimony has all been taken, and the true nature of the "Samson's" relation to her tow is in evidence, Barge No. 8, Barge No. 9, and Barge No. 27 should be declared free from liability for this collision, and the libel as to them dismissed, no matter what may be the decision of this court with respect to the liability of the "Samson."

In *The James Gray v. The John Fraser*, cited above, Mr. Chief Justice Taney laid down the rule covering this class of case in language that has been frequently cited in the books:

"It is true that *The John Fraser* was the *res* or thing which struck *The James Gray* and did the damage, yet the mere fact that one vessel strikes and damages another does not of itself make her liable for the injury; the collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a storm, be driven

from her moorings and forced against another vessel, in spite of her efforts to avoid it. Yet she certainly would not be liable for damages which it was not in her power to prevent. So also ships at sea, from storm or darkness of the weather, may come in collision with one another, without fault on either side; and in that case, each must bear its own loss, although one is much more injured than the other. * * * And as this collision was forced upon *The John Fraser* by the controlling power and mismanageemnt of the steam-tug, and not by any fault or negligence on her part, she ought not to be answerable for the consequences." (L. C. P. Co. Ed., 110).

It should be noted that in the case of *The John Cooker* and *The James W. Eaton*, as in the case of *The Doris Eckhoff* (which latter case Mr. Spencer quotes at page 258 ff., as tending to contravene *Sturgis v. Boyer*) both cited above, the tow was attached to the tug by a hawser and being pulled along in the tug's wake. This method of towing naturally renders necessary some degree of skill on the part of those steering or towing. Consequently, it is only natural that the question of the tow's liability should frequently arise in cases similar to this; but the case at bar presents essentially different facts. No steering was done by the "Samson's" scows; the entire management and control of their movements lay with the "Samson." In such circumstances, it is hard to see how any blame for the accident can be attached to the scows as distinguished

from the "Samson." The case of *The J. H. Gautier* and *The Herbert Manton*, cited above, is peculiarly in point. In that case the owners of a canal boat, which was lashed to the port side of a steam tug, and which was sunk in a collision with a schooner, libelled both tug and the schooner; and it was held that, although for the purpose of construing the rules of navigation, the canal boat and the tug together were to be construed as one steam vessel, the tug was solely responsible for the collision, and the owners of the canal boat were entitled to recover against the owners of the tug.

In conclusion Claimant's position may be briefly summarized as follows:

According to Claimant's version of the accident, the "Samson" and her tow were in no way responsible; if, however, the Court finds itself unable to accept either version, the libel should be dismissed, both parties paying costs by them made; and in case the Court should accept Libellant's version, the damages should be divided; but the Court should recognize that the amount thereof claimed by the Libellant is far in excess of the true damage, and, in any event, the "Samson's" tow should not be held liable for any of it.

TEAL, MINOR & WINFREE,
ROGERS MACVEAGH,

Proctors for Claimant.

DIAGRAM No. 1

LIBELLANT'S VERSION

- A—Position of "HENDERSON" on first sighting "SAMSON."
D—Position of "SAMSON" when first sighted by "HENDERSON."
E—Position of "SAMSON" when "HENDERSON" blew first whistle.
F—Position of "SAMSON" when "HENDERSON" blew second whistle.
B'—Position of "HENDERSON" when she blew second whistle.
B—Position of "HENDERSON" at second whistle as originally located.
C—Point of collision.
AB—Line showing course of "HENDERSON" and Oil-Barge.

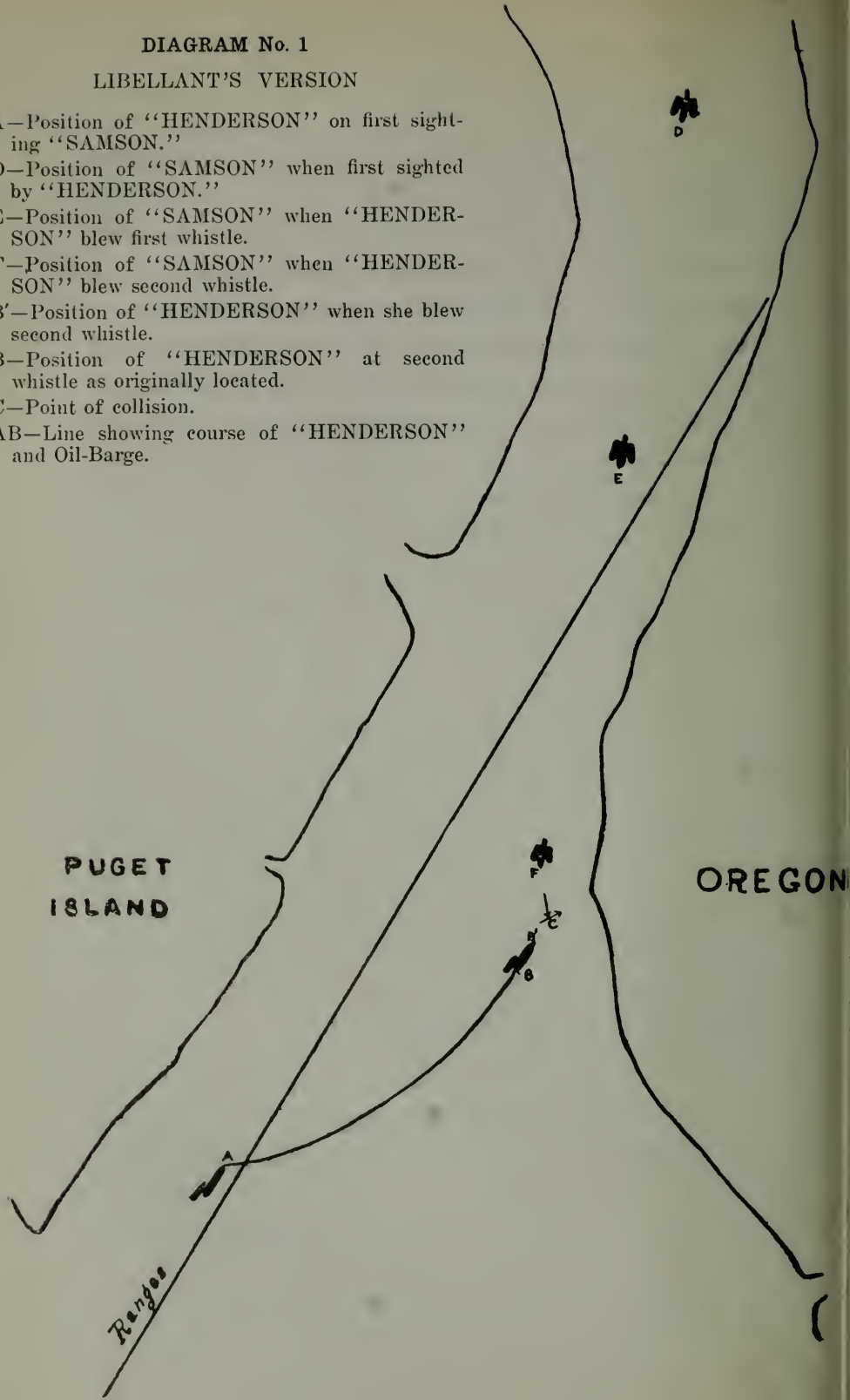


DIAGRAM No. 2

VARIATIONS IN TESTIMONY

A—"HENDERSON" when first sighted by "SAMSON."

A'—Former location of same by Capt. Sullivan.

G—"HENDERSON" at first whistle.

B—"HENDERSON" at second whistle.

B—Former location of same by Capt. Sullivan.

C—Point of collision (Capt. Sullivan).

D—"SAMSON" when first sighted by "HENDERSON."

E—"SAMSON" at first whistle.

F—"SAMSON" at second whistle, as first located by Capt. Sullivan.

F"—"SAMSON" at second whistle, as first corrected by Capt. Sullivan.

F"—"SAMSON" at second whistle, as finally corrected by Capt. Sullivan.

H, H', H", H"—Oil-Barge at anchor (Capt. Jordan, Goodell, Capt. Sullivan and Eddie Grove respectively).

I, I', I", I"—Two rock scows at anchor (Capt. Jordan, Goodell, Eddie Grove and C. Johnson respectively).

J, J', J"—One rock scow at anchor (Goodell, Capt. Jordan and C. Johnson respectively; Eddie Grove's location off the map below J").

Tracings from Libellant's Exhibits 1 and 4 and Standard Oil Exhibit 1.)

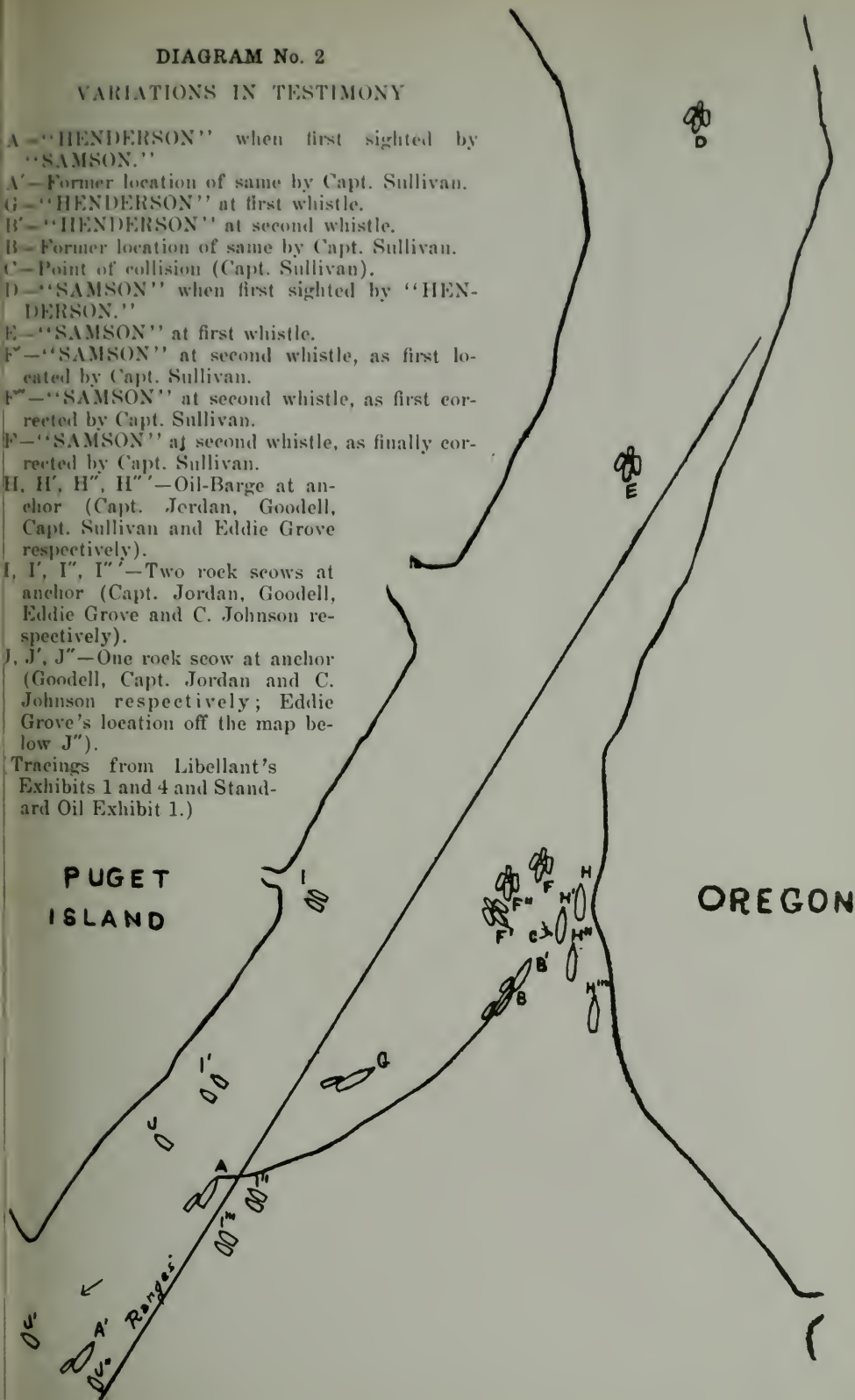


DIAGRAM No. 3

LIGHTS ON "SAMSON"

ARB—Length of "SAMSON," 110 ft. 4 in.

LM—Beam of "SAMSON," 25 ft. 4 in.

J—Port (red) light on "SAMSON."

K—Starboard (green) light on "SAMSON."

JK—16 ft. between lights, 36 ft. aft of "SAMSON'S" stem.

H I, D C, F G—Rock scows, 140 ft. long, 36 ft. beam.

N O—Stern of center scow, 50 ft. ahead of other scows.

ARB C D E—Mid-Ship's line of "SAMSON."

E—Point 400 ft. dead ahead of "SAMSON," where port and starboard lights are simultaneously visible.

J E—Line of port (red) light of "SAMSON."

K E—Line of starboard (green) light of "SAMSON."

$\angle J E R$ —Angle made by line of red light of "SAMSON" with Mid-Ship's line or course of "SAMSON" and tow.

(In rt. triangle J R E, $\angle J E R : \angle E J R = 8 \text{ ft.} : 436 \text{ ft.}$ Therefore $\angle J E R$ contains 1.624° , or about $1\frac{3}{4}^\circ$.)

(Tracing from Libellant's Exhibit 1.)

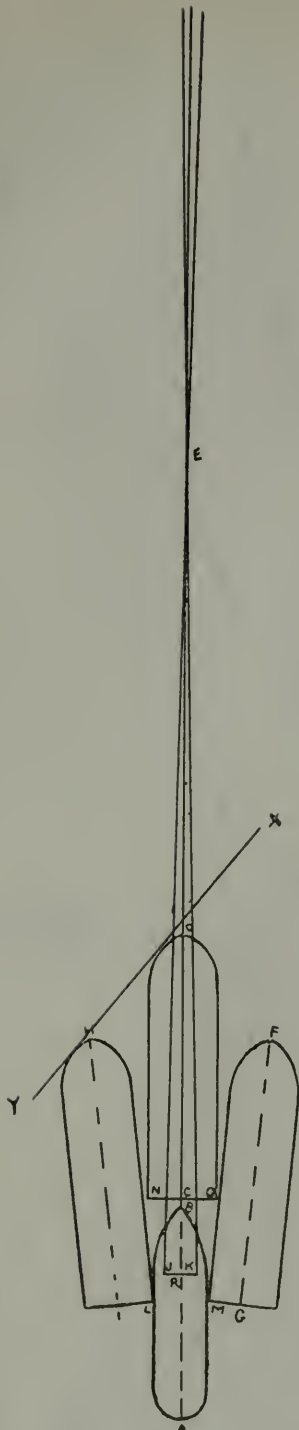


DIAGRAM No. 5

LIGHTS OF OIL-BARGE AND "SAMSON"

A—Oil-Barge when first sighted by "SAMSON."

B—Oil-Barge at second whistle.

C—Point of collision.

D—"SAMSON" when first sighted by Oil-Barge.

E—"SAMSON" at first whistle.

F—"SAMSON" at second whistle.

TVBS—Course of Oil-Barge furthest to port.

V—First possible point where Oil-Barge could have got on course TVBS.

VX—Line of green (starboard) light of Oil-Barge ($4\frac{1}{2}^\circ$ —see DIAGRAM No. 2).

PR, QR—Lines of red (port) light of "SAMSON" on courses DE and EF from points 400 ft. ahead of D and E respectively, i. e., P & Q

(1° —see DIAGRAM No. 1).

(Tracing from Libellant's Exhibit 1.)

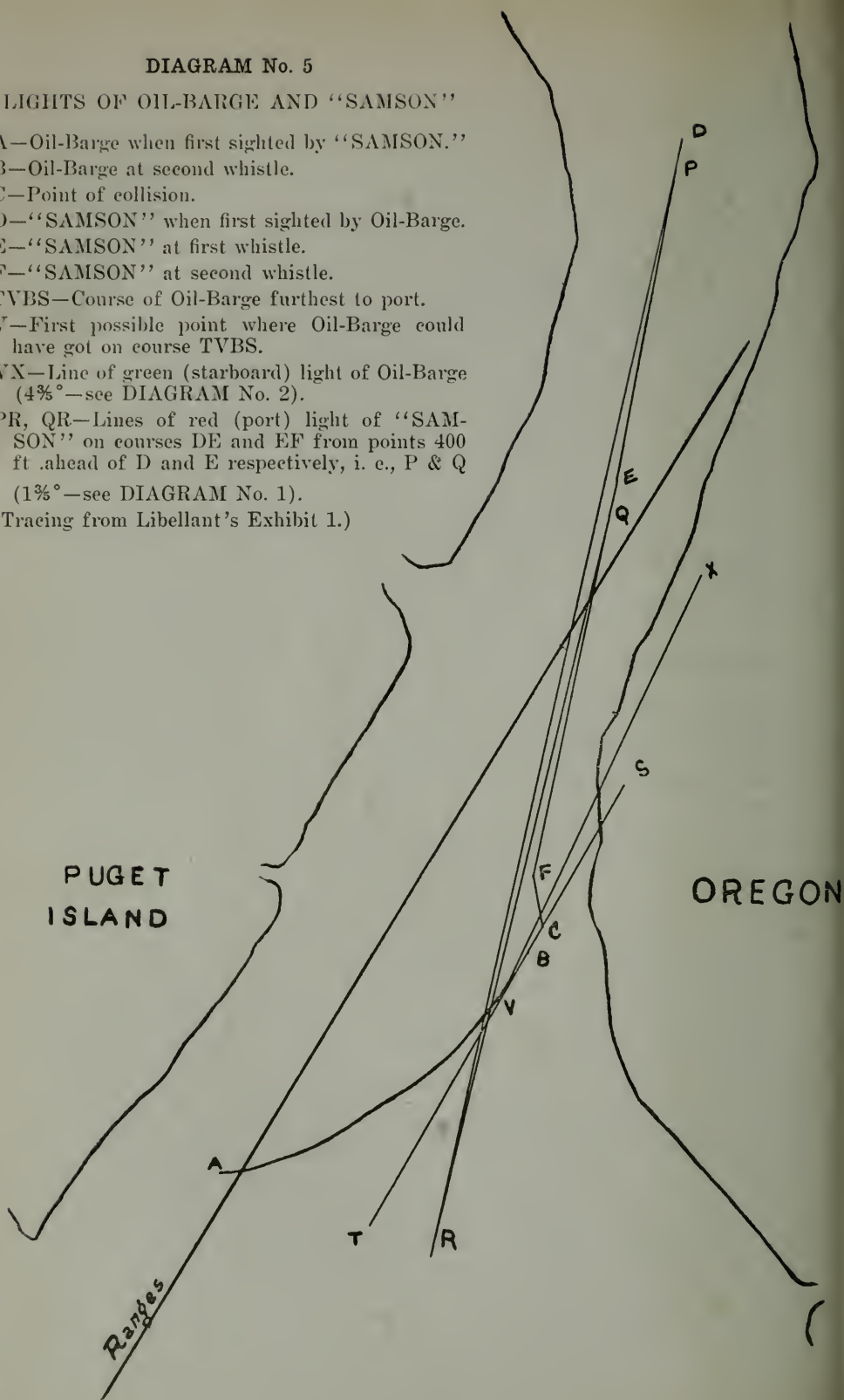
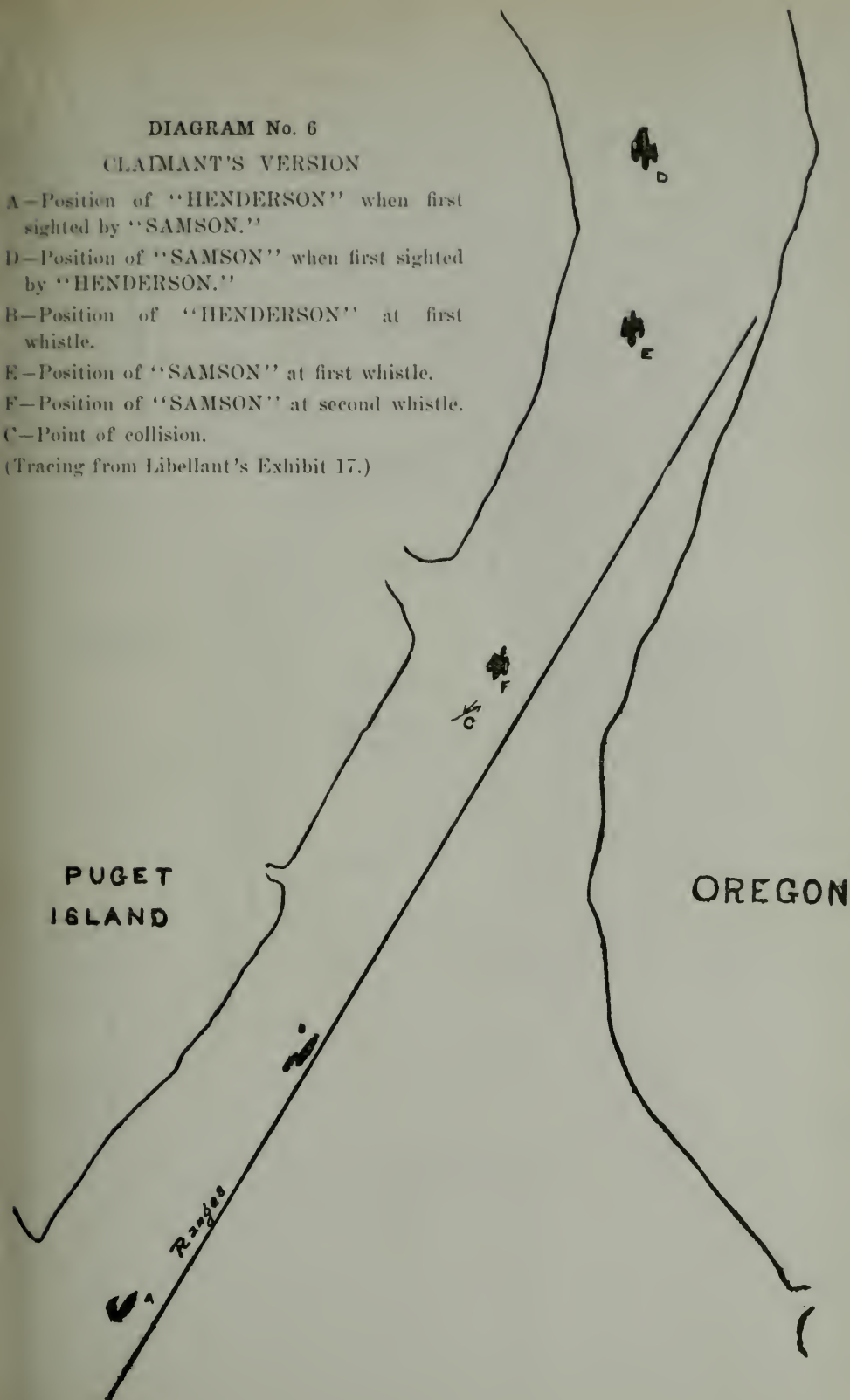


DIAGRAM No. 6
CLAIMANT'S VERSION

- A—Position of "HENDERSON" when first sighted by "SAMSON."
D—Position of "SAMSON" when first sighted by "HENDERSON."
B—Position of "HENDERSON" at first whistle.
E—Position of "SAMSON" at first whistle.
F—Position of "SAMSON" at second whistle.
C—Point of collision.
(Tracing from Libellant's Exhibit 17.)



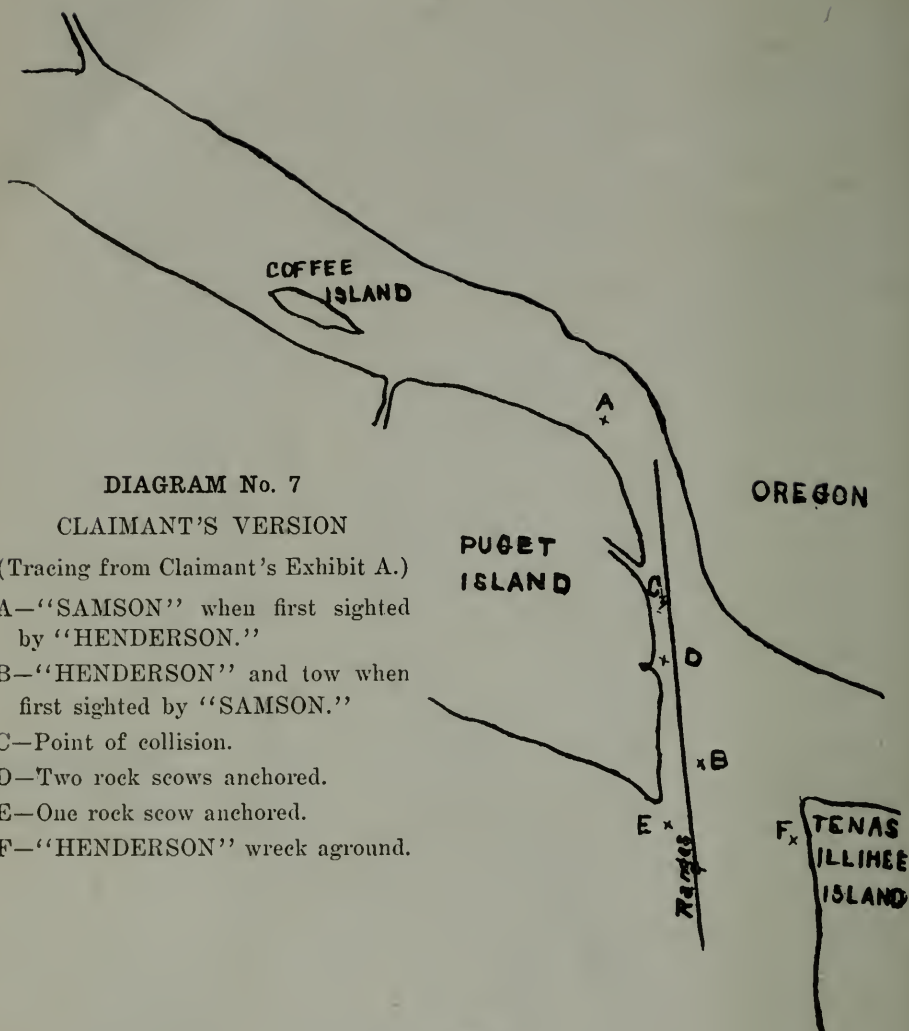


DIAGRAM No. 7

CLAIMANT'S VERSION

(Tracing from Claimant's Exhibit A.)

A—"SAMSON" when first sighted by "HENDERSON."

B—"HENDERSON" and tow when first sighted by "SAMSON."

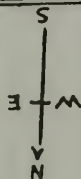
C—Point of collision.

D—Two rock scows anchored.

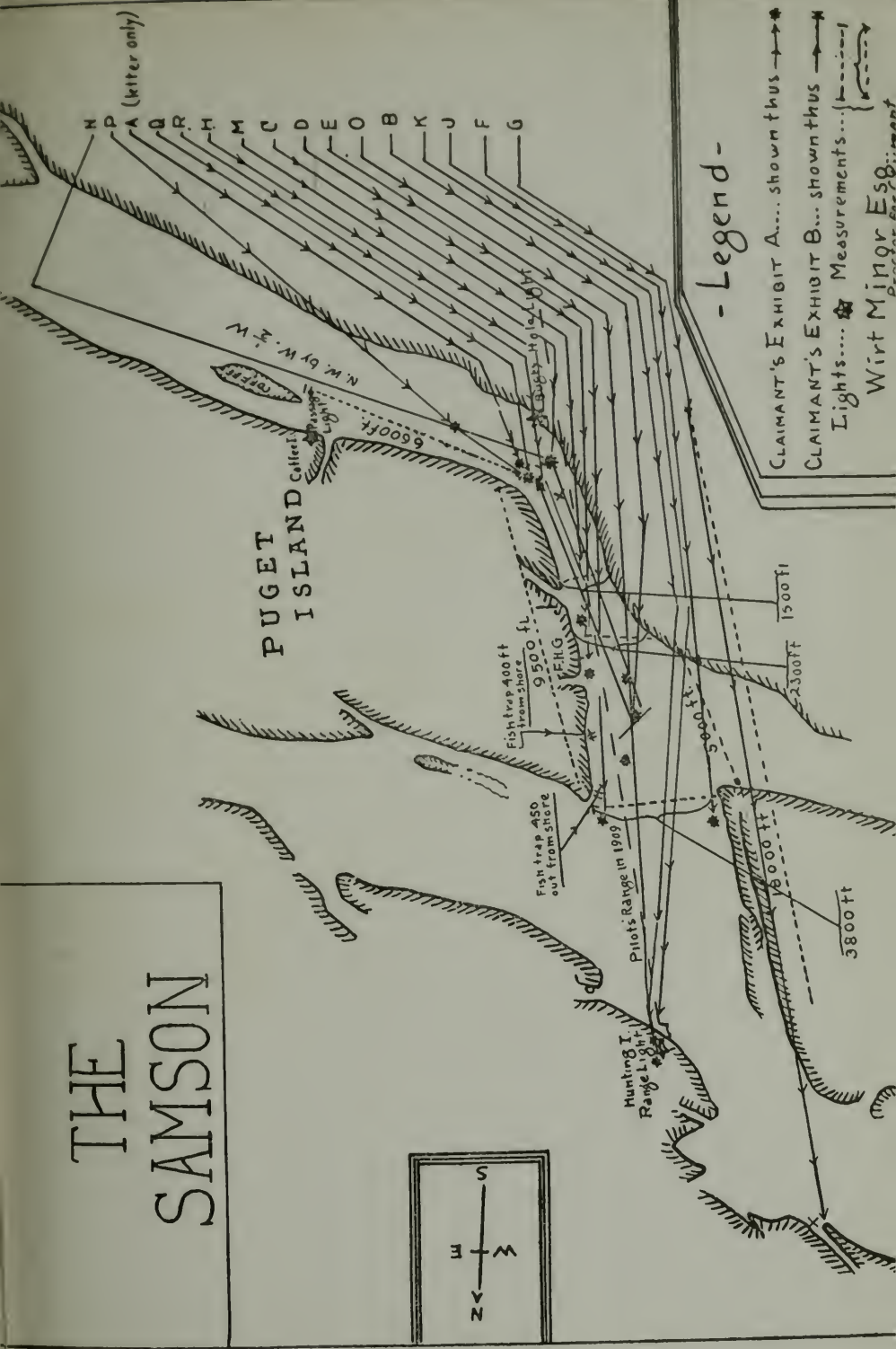
E—One rock scow anchored.

F—"HENDERSON" wreck aground.

THE SAMSON



PUGET ISLAND



- Legend -

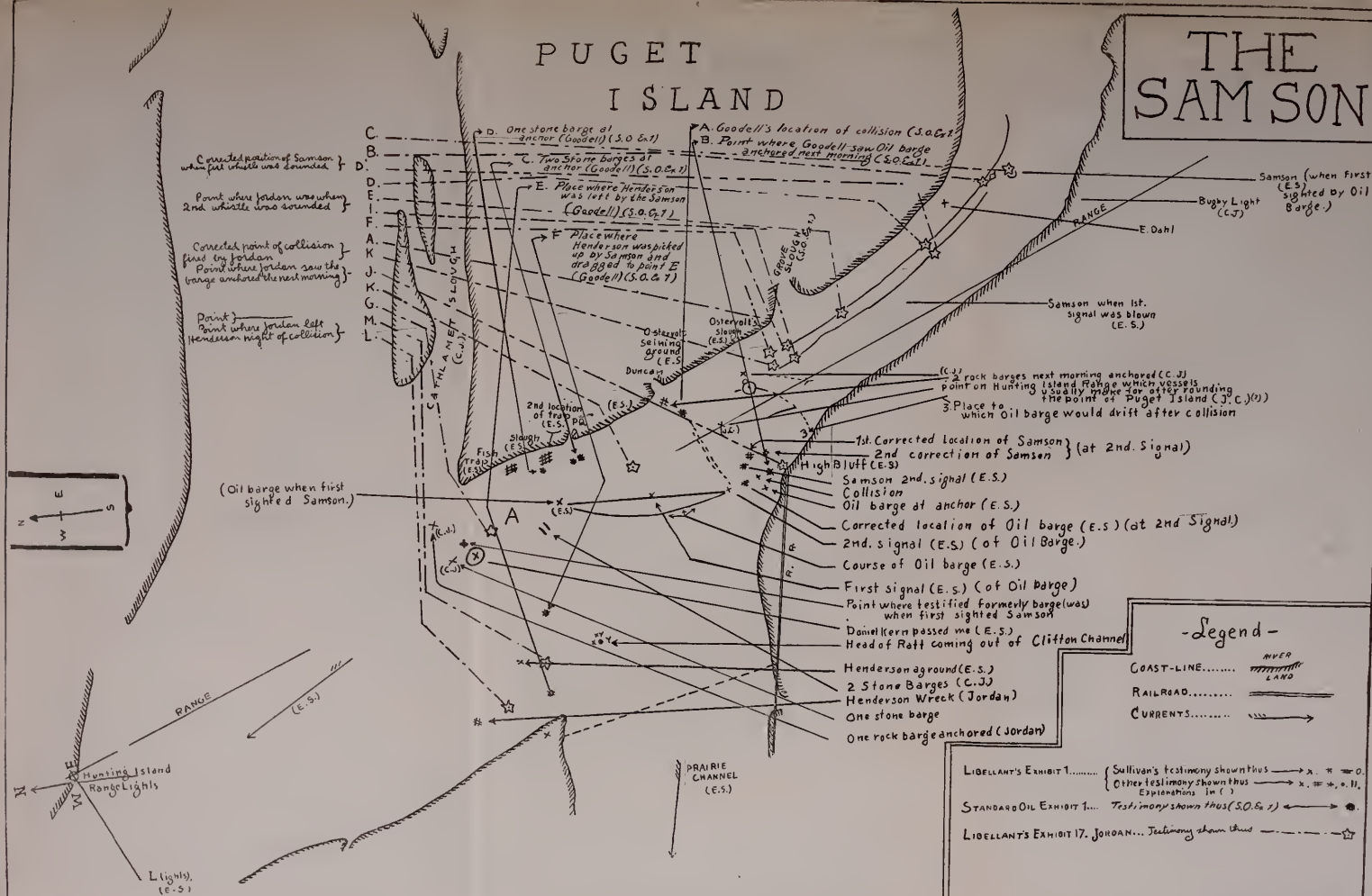
CLAIMANT'S EXHIBIT A... shown thus →

CLAIMANT'S EXHIBIT B... shown thus →

Lights... Measurements... {

Wirt Minor Esq.

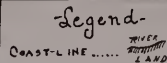
THE SAM SON



WIRT MINOR ESQ
Proctor for Claimant



THE SAMSON



LIBELLANT'S EXHIBIT 2 SULLIVAN.....
..... Testimony shown thus -----

LIBELLANT'S EXHIBIT 4 BOODIE GROVE
..... Testimony shown thus -----

LIBELLANT'S EXHIBIT 5 OLD GROVE.....
..... Testimony shown thus -----

LIBELLANT'S EXHIBIT 15 CAPT. J.W SHAVER....
..... Testimony shown thus -----

WIRT MINOR, ESQ.
Proctor for Claimant.



